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OUTLINES OF CRIMINAL LAW

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A l l r i g h t s r e s e r v e d

OUTLINES OF CRIMINAL LAW

BASED ON LECTURES DELIVERED IN THE
UNIVERSITY OF CAMBRIDGE

BY

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LATE M.P. FOR BARNSELY

Sontibus unde tremor, civibus inde salus

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PREFACE TO THE THIRTEENTH EDITION

THE present volume embodies the lectures which I gave at Cambridge, in the course of some forty years. When reducing them into the form of a book, I kept in view the needs of two classes of readers. For a general outline of Criminal Law may prove useful not only to young men preparing for academical or professional examinations, but also to many older men when called upon to undertake, without previous legal training, the duties of a justice of the peace. Both these classes find it important, moreover, to familiarize themselves with the foundations of the law of Evidence; and I therefore included that subject.

I have aimed at making the range of topics no wider than may be grasped upon a first perusal, even by a reader previously unfamiliar with law. But I have tried to treat each individual topic with such fulness as may serve to fix it effectually in the reader's memory. Yet the susceptibility of his memory must depend very much (as all lecturers soon discover) upon the extent to which the matter in hand arouses his interest. Fortunately the law of Crime—when once the preliminary difficulties attendant upon the chaotic form which it still retains in England have been faced and surmounted—is a branch of jurisprudence peculiarly capable of being rendered interesting. It is closely linked with history, with ethics, with politics, with philanthropy. My endeavour has been to supply illustrative examples that may give vividness and reality to the abstract principles of our Criminal Law; and to explain, by its connexion with the past, the various historical anomalies which still encumber it; and, moreover, to suggest the most

important controversies—psychological, social, juridical—that it is likely to arouse in the near future. Partly for the last-mentioned purpose, and partly because their importance even for present-day practice seems to me to be greater than is often supposed, I have given more than usual prominence to the subjects of Malice, Responsibility, and the Measure of Punishment. I also have made frequent use of the official statistics of our courts and prisons; in the hopes of presenting a precise idea both of the present administration of criminal justice in this country, and of the comparative importance of the various forms of its procedure.

To readers who have time to utilize the references given in the footnotes, it may be well to explain that the cases cited as from “K. S. C.” will be found in my volume of *Select Cases in Criminal Law*.

Should any one find Chapter I, which attempts to define the nature of Crime, to be at all difficult, I advise him to postpone its perusal until after reading the rest of the work. Definitions belong indeed rather to the end of our knowledge than to the beginning of it.

I am glad to know that this book was thought worthy of adaptation by an American editor for use in the University of Yale. An admirably rendered French translation of it has already been published.

In the last (the twelfth) edition I made extensive changes; parts of it were entirely re-written. In preparing the present issue, my endeavour has been to keep pace with the current of new enactments and new decisions. I have also added a Supplement; giving notes upon some topics which, though only subsidiary, are sufficiently important or interesting to deserve attention.

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CHAPTER I

THE NATURE OF A CRIME

THROUGHOUT forty years' experience as an academical lecturer upon various legal subjects, I found criminal law to be usually regarded, both by its students and by its teachers, as one of the most attractive portions of their work. It has of course a great practical importance; on account of the large number of our criminal tribunals and, consequently, of the persons who have to take part in their administration. For to young counsel and solicitors these criminal courts offer the readiest access to professional employment and thus to experience, instructive if not lucrative, in the practical details of advocacy. And even persons who have no professional interest in legal matters often find themselves engaged, as jurymen or Justices of the Peace, in discharging public duties in which a knowledge of the criminal law is of great assistance to them. Again, without any such call either of public duty or of professional activity, the plainest private citizen may easily have direct personal cause to realise the value of this kind of knowledge. For our civilisation is not yet so perfect that a man can be sure that even the most prudent administration of his affairs will save him from having to invoke the protection of the criminal law, or that even the highest moral rectitude will remove all risk of his having to defend himself against groundless and malicious criminal accusations. But there are also other causes, less utilitarian than any of these,

which nevertheless play a still greater part in giving the criminal portion of our law that special attractiveness which it unquestionably has, not only for professional students but even for ordinary readers. For this branch of study is rendered attractive to all thoughtful men by its direct bearing on the most urgent social difficulties of our time and on the deepest ethical problems of all times. And almost all men, whether thoughtful or thoughtless, are fascinated by its dramatic character—the vivid and violent nature of the events which criminal courts notice and repress, as well as of those by which they effect the repression. Forcible interferences with property and liberty, with person and life, are the causes which bring criminal law into operation; and its operations are themselves directed to the infliction of similar acts of seizure, suffering, and slaughter. The utmost violence which administrators of civil justice have power to inflict ranks only amongst the gentlest of those penalties by which the criminal courts do their work. Hence of all branches of legal study there is no other which stirs men's imaginations and sympathies so readily and so deeply.

The interest thus aroused tends naturally to facilitate the progress of law students through the difficulties of this subject; and has done much to produce the impression, which happily prevails in the minds of most of them, that this branch of their work is peculiarly easy. That impression is erroneous; though, no doubt, the beginner may acquire such a knowledge of criminal law as suffices for ordinary needs, either of examination or of everyday practice, without having to face so many points of intrinsic difficulty as he will usually find it necessary to master, whether for practice or for examination, in any other leading branch of our law.

But there is one grave—if not indeed insoluble—difficulty which has to be faced in studying the law of crime. And this difficulty comes at the very outset of the subject¹. For it

¹ If a student find the present chapter too difficult, he should postpone it until after reading the rest of the book.

consists of the fundamental problem—*What is a Crime?* Clearly the criminal law is concerned with crimes alone, not with illegal acts in general. But how are we to distinguish those breaches of law which are crimes from those which are merely illegal without being criminal¹?

Many attempts have been made to answer this question, and to propound a general definition of crime which shall distinguish wrongs which are criminal from those which are merely "civil." Moreover, as the distinction between criminal and non-criminal law is not peculiar to England but is familiar in every civilised country, attempts have naturally been made to go a step further, and to look for such a definition of crime as will express this difference in a form so general as to be applicable, not merely to England, but to all countries in which this distinction between criminal and civil prevails.

In attempting, whether for this general purpose or merely with reference to English law, to frame a definition of crime which shall separate the illegal acts that are criminal from those which must be treated in another branch of the law of Wrongs, the first course which naturally occurs to us is to see if some peculiarity, which may serve as a basis for our definition, can be found in the very nature of the criminal act itself.

(1) This was a course adopted by Sir William Blackstone when writing the great classical text-book of English law. The fourth volume of his *Commentaries on the Laws of England* is devoted to "Public Wrongs," or crimes; and his definition of a public wrong is given at the outset of it, though in two somewhat dissimilar forms. Of these the first is, "an act committed or omitted in violation of a *public law* forbidding or commanding it²." This answer, however, only drives us to the further question, What is meant by "public" law? That phrase has several well-accepted senses, but none of them seems applicable here. For if, with Austin³, we take public to be identical with constitutional law, then Blackstone's

¹ See Salmond's *Jurisprudence*, 7th ed., § 27.

² 4 Bl. Comm. 5.

³ *Jurisprudence*, Lecture xlv., p. 770.

definition will cover political offences alone, though they are only an extremely small portion of the whole field of crime. If again, with the Germans, we take public law to include, along with constitutional law, criminal law itself¹, the definition ceases to define. And if, finally, we adopt the only other familiar sense, and consider public law as equivalent to what is now more commonly called "positive law" or "municipal law"—that is to say, all law which has been made by the public authorities of a State²—the definition will obviously become too wide; for it will cover every legal wrong.

(2) We must therefore pass to Blackstone's next definition. According to this, a crime is "a violation of the *public* rights and duties due to the whole community, considered as a community³." Blackstone, of course, does not intend to suggest by this that crimes violate no other rights besides public ones; for obviously every theft violates some private right of property. What he meant is expressed more clearly in the form given to this definition by Serjeant Stephen in editing, or rather reconstructing, the Commentaries:—"A crime is a violation of a right, considered in reference to the evil tendency of such violation as regards the community at large." It may be remarked, in passing, that this form of words introduces a new error, by limiting crimes to violations "of rights"; whereas, as Blackstone had well pointed out, a crime may be a violation either of a right or only of a duty. For one remarkable difference between criminal and "civil" (*i.e.* non-criminal) law lies, as we shall subsequently see, in the fact that, whilst breaches of the latter always involve an infringement of some person's right, the criminal law makes it our duty to abstain from various objectionable acts although no particular person's rights would be invaded by our doing them. Instances of crimes which do not violate any one's right may be found in the offences of engraving upon any metal plate (even when it is your own) the words of

¹ Holland, *Jurisprudence*, ch. ix., ch. xvi.

² Austin, pp. 781, 787.

³ 4 Bl. Comm. 5.

a bank-note, without lawful excuse for so doing¹; or of being found in possession of house-breaking tools by night²; or of keeping a live Colorado beetle³.

The idea which Blackstone and Stephen are here attempting to embody is one of great importance, if only on account of the wide currency it has obtained; and it deserves a very close scrutiny. Crimes, according to this idea, are such breaches of law as injure the community. Now there can be no doubt that if we make a merely general contrast between crimes, taken as a mass, and the remaining forms of illegal conduct, taken similarly as a mass, the amount of harm produced by the former group will be much greater and much more widespread than that produced by the latter. This fact was observed even so early as in the days of the Roman Empire. Roman jurists who noted this specially strong tendency of crimes to injure the public, supposed it to be the reason why their forefathers had called crimes "*delicta publica*" and criminal trials "*judicia publica*." As a matter of actual history, those phrases were not suggested originally by this; nor even, as Justinian fancied (Inst. 4. 18. 1), by the rule that any member of the public can prosecute a criminal; but by the fact that in early Rome all charges of crimes were *tried* by the public itself, *i.e.* by the whole Roman people assembled in *comitia centuriata* (see p. 24 *infra*). Long after this form of trial had become obsolete, and the origin of the epithet consequently obscure, crimes still continued to be called "public." And the phrase did not end with the Roman law; but, as we have seen, plays a prominent part in the classifications and the definitions of our own Blackstone. Its survival was doubtless due to the recognition of the unmistakable public mischief which most crimes produce. Were only a rough general description to be attempted, this public mischief ought undoubtedly to be made the salient feature. But can we accept it as sufficient foundation for the precise

¹ Forgery Act, 1913, s. 9 (c).

² 24 and 25 Vict. c. 96, s. 58.

³ 40 and 41 Vict. c. 68.

accuracy necessary in a formal definition? Such a definition must give us "the whole thing and the sole thing"; telling us something that shall be true of every crime, and yet not true of any conceivable non-criminal breach of law. Clearly then we cannot define crimes by mere help of the vague fact that "they usually injure the community." For every illegal act whatever, even a mere breach of contract, must be injurious to the community, by causing it alarm at least, if not in other ways also. Indeed had not this been the case, the community would not have taken the trouble to legislate against the act. Moreover we cannot even make the question one of degree, and say that crimes are always *more* injurious to the community than civil wrongs are. For it is easy to find instances to the contrary¹. Thus, until 9 Geo. I c. 22, English law made it no crime to kill another person's horses, though it was a crime to steal them; yet the former wrong, since it involved the actual destruction of wealth, was obviously the more injurious to the community.

Similarly, even at the present day, it is possible that, without committing any crime at all, a man may by a breach of trust, or by negligent mismanagement of a Company's affairs, bring about a calamity incomparably more widespread and more severe than that produced by stealing a cotton pocket handkerchief, though that petty theft is a felonious crime. Indeed a person's conduct may amount to a crime even though, instead of being an evil to the community, it is, on the whole, a benefit; as where a defendant was held guilty of the offence of a common nuisance, because he had erected in Cowes Harbour a sloping causeway which to some extent hindered navigation, though by facilitating the landing of passengers and goods it produced advantages which were considered by the jury to more than counterbalance that hindrance².

Hence we cannot say, with anything like that unvarying precision which a definition requires, that a legal wrong is a

¹ Cf. p. 10, n. 1 *infra*.

² *Rex v. Ward*, 4 Ad. and E. 384.

crime if it tends to cause evil to the community. Nay, it does not necessarily become a crime even when this public evil tendency is expressly recognised by law, and made the sole ground for legally prohibiting the hurtful conduct. For there exists a well-known class of proceedings called "penal actions," by which pecuniary penalties can be recovered—in some cases¹ by any person who will sue for them—from the doers of various prohibited acts; these acts being thus prohibited, and visited with penalties², solely on account of their tendency to cause evil to the community at large, "considered as a community." For example, a person who, in advertising a reward for the return of lost property, adds that "no questions will be asked," incurs by the Larceny Act a penalty of £50 recoverable by anyone who will sue for it³. In like manner, the County Courts Act, 1888, provides that if any officer of a county court shall act as a solicitor in any suit in that court, he shall be liable to a penalty of £50⁴ similarly recoverable⁵. Yet the litigation by which an informer enforces such a penalty against a wrong-doer is not treated by English law as a criminal, but as a "civil," proceeding; and the wrong-doing itself is not regarded as a crime⁶. This anomalous method of checking ill-doing has long been discredited; but

¹ Styled "Popular" actions. In 1912 an informer sued Sir S. Samuel, M.P., for £46,500 as penalties. The words "Henslow, common informer," still legible on the front of Corpus Christi College at Cambridge, are a wrong-doer's protest against a Professor's public-spirited attempt thus to punish bribery at a Parliamentary election; see *The Times*, March 23, 1835.

² But "penalty" is *prima facie* a criminal term; so express words in the Statute are necessary to make a penalty recoverable by civil proceedings, or, even then, by an unofficial informer.

³ 24 and 25 Vict. c. 96, s. 102. See L. R. [1901] 2 K. B. 564.

⁴ 51 and 52 Vict. c. 43, s. 41.

⁵ Similarly by 31 Eliz. c. 6, at every election of a fellow or scholar in a College the statutes relating thereto must be publicly read to the meeting, or a penalty of £40 may be recovered from each defaulter "by any person that will sue for the same." Yet this penalty is far from having secured habitual obedience.

⁶ *Atcheson v. Everitt*, 1 Cowp. 382 (K. S. C. 4). Yet in Private International Law the proceeding is included amongst "penal" actions; and therefore cannot be brought in the courts of a foreign country.

in the early part of the nineteenth century it was so popular with Parliament that every session saw new instances of it enacted¹.

Hence to speak of crimes as those forms of legal wrong which are regarded by the law as being especially injurious to the public at large, may be an instructive general description of them; but it is not an accurate definition.

(3) The same may be said of a way of distinguishing them which is often adopted in the course of political discussions, and which probably is the one that most naturally suggests itself to an ordinary man's mind—the limitation of the idea of crime to those legal wrongs which violently offend our moral feelings. Here again, however, we only find a rough test; it holds of *grave*² crimes in the mass, as contrasted with civil wrongs in the mass, but breaks down when we come to apply it with the universality of a definition. It is in recognition of the fact that many crimes involve little or no ethical blame that Natal and West Australia, when legally prohibiting the immigration of convicted criminals, limited the prohibition to those whose offences “involved moral turpitude.” Thus, for example, Treason is legally the gravest of all crimes, yet often, as Sir Walter Scott says, remembering Flora Macdonald and George Washington³, “it arises from mistaken virtue, and therefore, however highly criminal, cannot be considered disgraceful”;—a view which has received even legislative approval, in the exclusion of treason and other political offences from international arrangements for extradition. Again, to take a very different example, the mere

¹ It is still popular in the legislatures of the United States.

² *E.g.* of nearly all indictable offences; but not of more than a tenth of the petty offences that are punished summarily, like cycling offences, or selling bread “otherwise than by weight,” or paying wages in a public-house (46 and 47 Vict. c. 31, s. 3). Hence even the official statistics distinguish the “fully, really, and strictly criminal” offences from the mere “quasi-criminal” ones which, though they affect public convenience, involve no dishonesty or violence. Cf. p. 19 n. 2 *infra*; and L. R. [1915] 1 K. B. 600.

³ These historical references were unfortunately reproduced to me in a Tripos paper thus: “The conduct of Flora Macdonald towards George Washington, was treasonable, yet quite praiseworthy.”

omission to keep a highway in repair shocks nobody, but it is a crime¹; whilst many grossly cruel and fraudulent breaches of trust are mere civil wrongs. Directors of a company may ruin it by the grossest negligence, bringing many shareholders to poverty; and yet incur no criminal liability. Conduct may, indeed, be grossly wicked and yet be no breach of law at all. A man who should callously stand by and watch a child drowning in a shallow pond, would arouse universal indignation; but in England (unlike France) he would have committed neither a criminal nor even a civil wrong². Cf. p. 121 *infra*.

This failure of the most approved tests of criminality that are based on the nature or the natural consequences of the criminal acts themselves, may lead us to suspect that there exists no intrinsic distinction between those acts which are crimes and those which are not. It may nevertheless be possible to trace some extrinsic one. For there may be some unmistakable difference between the respective legal consequences of these two classes of acts. It would, indeed, be purely technical; amounting merely to a distinction between criminal procedure and civil procedure. But it would at any rate enable us to distinguish between these two, and then to define a crime as being "an act which gives rise to that kind of procedure which is styled criminal."

(4) Some writers have laid stress upon a difference between the respective degrees of activity manifested by the State in the two cases. In "civil" matters, say they, the State does not interpose until actual wrong has been done; and, even then, it does not interpose unless some private person institutes litigation; and no person is allowed to institute it except the one who has been directly injured by the wrong. In criminal matters, on the other hand, every fully civilised

¹ Yet indictments for it have become rare since 1894, when the Local Government Act empowered the local Road Authority to effect the repairs and recover the cost from the person liable to repair.

² Unless he had some *special* duty to the child. A father would have; a grandfather usually would not; *Reg. v. White*, L. R., 1 C. C. R. 311.

State maintains an elaborate staff of police to prevent offences from being committed; and, if one be committed, a prosecution may always¹ be—indeed in many countries, it can only be²—instituted by public functionaries, without any co-operation on the part of the person injured; and possibly the law may³ give every person in the community, whether injured or not, a right to institute a prosecution. This contrast is a genuine and a vivid one; and the tendency of modern criminal legislation is to intensify it. Yet it cannot be applied with such unvarying precision as to afford the basis for a definition. For, on the one hand, civil proceedings are often taken in order to obtain an “injunction” against some anticipated wrong which has not yet been actually committed; and, on the other, many offences that are undeniably criminal are so trivial that the police would not interfere beforehand to prevent them. Again, there are some few crimes for which, even in English law, a prosecution cannot be initiated by any private person, even though it be the victim himself, except by direct permission from the State⁴; whilst, as we have seen, those “penal actions” which may be instituted by any private person who chooses to turn informer, are classed amongst civil proceedings. And the fact that there still survive many old local “Associations for the Prosecution of Felons” serves at least to shew that the activity of the State

¹ Though in eastern lands, *e.g.* India and China, there still survive a few offences for which only the injured party can prosecute; a curious link between Crime and Tort.

² Thus in France the Code d'Instruction Criminelle provides (Art. 1) that “L'action pour l'application des peines n'appartient qu'aux fonctionnaires.” In Scotland, though it is theoretically possible for an injured person to prosecute, such private prosecutions, except in mere petty complaints, are obsolete. *Coats v. Brown* (Sessions Cases, 1909, p. 29) was the first for very many (some say four hundred) years past. The Lord Advocate must prosecute; or at least authorise the prosecution. Hence actions for Malicious Prosecution, familiar in England, are unknown in Scotland.

³ It does so in England; *X* can prosecute *Y* for assaulting or libelling *Z*; even though *Z* forbid the prosecution.

⁴ *E.g.* the crimes specified in the Vexatious Indictments Act; see p. 471. For prosecutions that require the consent of the Attorney-General, see Halsbury's *Laws of England*, ix, 293; and see p. 537 *infra*.

in instituting criminal prosecutions has not always been found adequate.

(5) It might, again, be expected that the two procedures could be distinguished by a difference in the tribunals in which they are employed. But this is not so; for as we shall hereafter see, it often happens, alike in the case of the humblest and of the most dignified tribunals, that both criminal and civil proceedings may be taken in the same court.

(6) But between the two kinds of proceedings themselves various points of contrast have been remarked. It is evident, for instance, that the object of criminal procedure always is *Punishment*; the convicted offender is made to undergo evil which is inflicted on him not for the sake of redress but for the sake of example¹. The infliction does not provide compensation to the person who has been injured by the crime, but is simply a warning—a *documentum*, as the Roman lawyers called it—to persons in general not to cause such injuries. In civil proceedings, on the other hand, the order which is made against an unsuccessful defendant is usually concerned with no interests but those of the parties to the litigation; the defendant is forbidden to infringe the plaintiff's rights or, still more frequently, is directed to pay him a sum of money in reparation of some right which he already has actually infringed. In assessing that sum of money, the tribunal will usually be guided by the amount of loss the plaintiff has sustained through the wrong, without considering whether or not that amount is large enough to render the payment of it so inconvenient to the defendant as to be a lesson to him. Even where the wrong complained of is an adultery, the damages given to the injured husband must (it is now settled) be no greater against an adulterer who is rich than they

¹ The conditional Evil which persons will incur if they break a law, and which thus renders that law binding, (*sancit*) is called by jurists its Sanction. Hence they say (paradoxical though it sounds to non-legal hearers) that "Punishment is the Sanction of crimes."

would be were he poor¹. And even in those cases where civil proceedings result, not in a payment of money, but in the defendant's being sent to prison, a similar distinction is traceable. For he will be set free as soon as he is willing to do what the court has ordered; civil imprisonment being only "coercive," and not, like criminal imprisonment, "punitive." At first sight, therefore, it may seem to be quite easy to distinguish civil proceedings from criminal ones, by saying that punishment is always the aim of the latter but never the aim of the former. But when we take a more comprehensive view of civil litigation, we find that there are cases in which a part of its object—and indeed others in which the whole of its object—is to punish. Thus there is a large class of ordinary civil cases in which "exemplary" damages are permitted². Where, for example, a plaintiff has been assaulted or slandered or defrauded, the jury need not limit the damages to such an amount as suffices to make good his loss; they may also take into account the degree of violence or oppressiveness or malice of which the defendant has been guilty, and give more liberal damages in retribution of it. Thus in a case of assault, as much as £500 damages have been given for knocking off a man's hat, and a higher court has refused to treat the amount as excessive³. Moreover that peculiar class of proceedings called penal actions belong, as we have seen, to civil procedure; and yet they exist solely for the purpose of inflicting punishment. When in such an action, an informer recovers a penalty from some one who—for instance—has opened a place of amusement on a Sunday (cf. p. 16 n.), the money is not exacted because the informer has suffered by the wrong-doing, but only because the community desires to prevent such wrong-doings from being repeated. The law inflicts these penalties from precisely the same motive which

¹ L. R., 11 P. D. 100. Divorce proceedings, like those in Bankruptcy, are civil, despite the immorality of their causes and the gravity of their results; L. R., 2 P. & M. at p. 141. Hence they can be brought against an insane person; and they can lawfully be "compounded."

² Pollock on Torts, Bk. I. ch. 5.

³ Cited in 5 Taunton 442.

leads it to send thieves to gaol or murderers to the gallows. We are brought, then, to the conclusion that, whilst punishment is admittedly the object of all criminal proceedings, it sometimes is the object of civil ones also. If the aim of the legislature, in creating any particular form of litigation, clearly was to punish, this raises a strong probability that the litigation ought to be treated as a criminal proceeding. But it gives us a probability only; and not that positive-certainty which a definition requires.

(7) If, however, we pass from the purpose with which (in either case) the unsuccessful defendant is made to undergo some evil, or "sanction," to the differences perceptible between the respective sanctions themselves, a more plausible ground of distinction is reached. For it may be said that, on the one hand, all civil sanctions, even those of penal actions, directly enrich some *individual* (whether by awarding him money or by securing him the specific performance of some act to which he has a right); whilst criminal sanctions inflict a loss or suffering that never enriches any individual—though occasionally, as in the cases of fines or confiscations, it may enrich the State. This is almost precisely true, but not quite. For in "penal actions," unless the statute expressly authorises private persons to act as informers, the State alone can sue and recover the penalty; and yet there is full authority for ranking such suits by it as merely civil proceedings¹. And, conversely, mere civil actions for debt used, in former days, often to end not in enriching the plaintiff, but merely in imprisoning the debtor; for if the defendant had no property out of which the amount for which judgment had been given could be realised, he himself could generally be seized in execution. And even now, although the Debtors' Act, 1869², has abolished the old matter-of-course imprisonment for debt, yet even under it (sec. 5), if the non-payment of a judgment

¹ See *Rex v. Hausmann*, 3 Cr. App. R. 3; *Att. Gen. v. Bradlaugh*, L. R., 14 Q. B. D. 667 (K. S. C. 7); *Att. Gen. v. Bowman*, 2 B. and P. 532.

² 32 and 33 Vict. c. 62.

debt is wilful, the debtor may be committed to prison; as also may those who disobey various kinds of orders made at petty sessions for payment of money, *e.g.* for rates, or for maintenance of wives. Several thousands of such orders of commitment are made every year. Such imprisonment of course is, as we have seen, not punitive but only coercive; for the debtor will be at once released if he consents to pay what he owes.

(8) But a real and salient difference between civil and criminal proceedings may be discovered, if we look at the respective degrees of control exercised over them by the Sovereign; not so much in respect (as we have already said) of their commencement as of their termination. Austin¹ has established that the distinctive attribute of criminal procedure, in all countries, lies really in the fact that "its sanctions are enforced at the discretion of the Sovereign." This does not mean that the Sovereign's permission must be obtained before any criminal proceedings can be taken, but that he can at any time interfere so as to prevent those proceedings from being continued, and can even grant a pardon which will release an offender from all possibility of punishment. Thus the "sanctions," the punishments, of criminal procedure are remissible by the Crown. Moreover they are not remissible by any private person. Such a person may be the sole victim of the crime, he may even have taken the trouble to commence a prosecution for it, yet these facts will not give him any power of final control over the proceedings; and no settlement which he may make with the accused offenders will afford the latter any legal immunity. The prosecution which has been thus settled and abandoned by him may at any subsequent time, however remote, be taken up again by the Attorney-General or even by any private person. Thus in *Rex v. Wood*² a man had begun a prosecution against the keeper of a gaming house, and em-

¹ *Lectures on Jurisprudence*, Lect. xxvii.

² 3 B. and Ad. 657. Cf. *Smith v. Dear*, 88 L. T. 664.

ployed a particular solicitor to conduct the proceedings. He afterwards changed his lawyer; and subsequently arranged matters with the defendant and dropped the prosecution. Thereupon the original solicitor took it up, and brought it to trial. The former prosecutor protested against this activity, but in vain; the Court of King's Bench insisted that the case must proceed. All this is in striking contrast to the rules of civil procedure, where the party injured usually has an absolute legal power of settling the matter and of remitting the sanction, alike before he has commenced proceedings and after he has commenced them; whilst the Sovereign, on the other hand, has usually no power to interfere, and no pardon granted by him could relieve the offender from his liability to make redress to the injured person.

Austin here has suggested a true principle of demarcation; (though, to avoid including actions for recovery of the Crown's debts or other civil rights, we should add that all criminal sanctions "are imposed with a punitive purpose"). But he suggested it only in general terms; so that, for any particular system of criminal law, some difficulty may arise in expressing it with the completeness locally necessary. Thus in English law two exceptional rules must not be overlooked. One is that the Crown's power of pardon, though nearly universal, is not absolutely so (*infra*, pp. 502-3). For by the common law a public nuisance, whilst still unabated, cannot be pardoned; and by the Habeas Corpus Act, another offence, that of sending a man to prison outside England, is also made unpardonable, lest politicians obnoxious to the Crown should be kidnapped by Crown servants with impunity. Accordingly the punishment of these two offences is not remissible; (except, of course, by passing a special Act of Parliament, an anomalous interference with the rules of law such as would equally suffice to remit any non-criminal sanction). We must therefore modify Austin, and not say more than that "crimes are wrongs whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the

Crown alone, *if remissible at all*.” The other qualification in English law arises from the anomalous character of those penal actions by a “common informer” which in this country complicate so artificially the natural boundary between criminal and civil law. Were it not for them, it would be sufficient to say simply, with Austin, that the sanctions of civil procedure are always remissible by the party suing and are never remissible by the Crown (unless it be itself that party). But penal actions have long ceased to be remissible quite freely by the party suing; for 18 Eliz. c. 5 requires him to obtain leave from the court before compromising the action. Moreover they have always been to some extent remissible by the Crown; for, even at common law, the Crown always had power to give a valid pardon before any informer had commenced an actual suit; (though not after he had commenced one and so secured to himself a vested interest in the penalty). And under some statutes, like the Lord’s Day Act, 1875, the power is not terminated even by a suit being brought¹. Hence, to allow for the peculiarities of this form of civil procedure, we must modify Austin’s account of civil wrongs, and say that a wrong is civil if *any* power of remitting its sanction can be exercised, whether freely or even under restrictions, by any private person. The Crown may, as we have seen, though only in one rare and peculiar class of cases, have the power of remitting a civil sanction. But no private person can ever grant a valid remission of any criminal sanction. Herein lies the only ultimate and unvarying distinction between the two kinds of procedure; (though, as we have seen, the familiar everyday instances of both are characterised by other and more conspicuous, though less indispensable, distinctions). For the judicial proceedings taken against a wrong-doer may produce a variety of results. There may be:

¹ See for instance the effect of this Act (38 and 39 Vict. c. 80) in extending the Crown’s power of pardoning offences committed against Bishop Porteus’ Act (21 Geo. III c. 49) which restrains the holding of concerts and other public entertainments on Sunday.

1. Civil proceedings producing merely restitution or compensatory damages. Plaintiff is actually out of pocket by paying his own costs.

2. Civil proceedings producing efficient redress (*i.e.* both damages and also costs, or specific redress, or prevention). A "documentum" to defendant; but plaintiff is not enriched.

3. Civil proceedings producing exemplary damages. A documentum to defendant, and an actual profit to plaintiff.

4. Civil proceedings in which an informer receives or shares a penalty. A documentum to defendant, and an actual profit to plaintiff. See instances on p. 7.

5. Civil proceedings in which the Crown receives the whole of a penalty¹. A documentum to defendant, but a profit to the State alone².

6. Criminal proceedings. A documentum to the defendant; either a profit to the State alone, or, more usually, no profit even to it.

In recent years the question as to the dividing line between civil and criminal proceedings has assumed great practical importance, and has occupied the attention of the English courts with unusual frequency. For many controversies have arisen under the Judicature Act, 1873, which, when creating a general Court of Appeal for *civil* cases, enacted (by s. 47) that no appeal to it should lie "in any criminal cause or matter³."

In dealing with these cases, the courts have recognised that a matter may be criminal even though it be too trivial to

¹ These are now decided to be civil (and even when the penalty is enforceable by an imprisonment, if it be a Coercive—not a Punitive—one). See p. 13 n. (1), *supra*.

² *E.g.* proceedings against an M.P. for voting before taking the Parliamentary oath. Or proceedings for smuggling. Or for making a false return of income for the purpose of income tax (here the offender may also be prosecuted *criminally*, under s. 5 of the Perjury Act, *infra*, p. 301).

³ The question whether proceedings are criminal or civil is of practical moment also as affecting the rules of Evidence, the parties' power of compromising the dispute or of waiving the rules of procedure, the Crown's power of pardon, and the risk of an action for malicious prosecution.

end in trial by a jury or in an imprisonment. Thus it is a "crime" not to send your child to school¹; though it cannot be prosecuted in any higher tribunal than a police-magistrate's, and the utmost possible punishment for it is a fine of a sovereign. Similarly they recognise that a matter may be criminal without involving any moral turpitude; as where a limited company omits to send to the Registrar of Joint Stock Companies the annual list of its members². Up to the present time, they have found it a practically sufficient test to inquire whether the object of the proceedings is punitive or not. They regard any proceedings as "criminal" which may terminate in the infliction of a Punishment; even though it be merely a pecuniary fine; and even though this fine be not inevitable but only alternative, *e.g.* where the defendant might either have been ordered to pay a fine or to abate the nuisance complained of, and in fact only the abatement was ordered, so that no fine was imposed³. For proceedings which are not punitive cannot (*supra*, p. 11) be criminal, and proceedings which are civil are very seldom punitive; so that in the vast majority of cases this simple test, punitiveness or nonpunitiveness, will answer the question as to who has the legal power of remitting the sanction⁴. But it is upon this last and fundamental question that, as we saw (p. 14), the criminal or civil character of the proceedings finally depends.

Inasmuch as the difference between crimes and civil in-

¹ *Mellor v. Denham*, L. R., 5 Q. B. D. 467.

² 25 and 26 Vict. c. 89. s. 26.

³ *Reg. v. Whitchurch*, L. R., 7 Q. B. D. 534. As non-civil imprisonment may follow (*infra*, ch. XXIX.) in default, sometimes even non-wilful default, of payment of a punitive fine, the essential mark of Crime is usually spoken of as being liability (either immediate or on default)—not to *Punishment*, in general, but—to such imprisonment. Cf. *Robson v. Biggar*, L. R. [1908] 1 K. B. 672; where the penalty imposed on a distrainer who overcharges, though it can be recovered only by the party aggrieved, was held to be criminal; because imprisonment could be inflicted in default of payment. See also *Seaman v. Burley*; L. R. [1896] 2 Q. B. 344.

⁴ *E.g.* if a commitment for contempt of court was meant to be a punitive one, the Sovereign (or similarly a colonial governor acting on his behalf) can release the offender; *Moseley's Case*, L. R. [1893] A. C. 138.

juries does not consist of any intrinsic difference in the nature of the wrongful acts themselves, but only in the legal proceedings¹ which are taken upon them, the same injury may be both civil and criminal; for the law may allow both forms of procedure if it like. And, in this very way, the distinction between civil wrongs and crimes was formerly much obscured in England, when our civil courts were allowed to try "Appeals of Felony." The sole object of such a proceeding was to inflict capital punishment upon a man guilty of heinous crime. Yet the proceeding was taken in a civil court; and was conducted by civil rules of procedure (the accused, for example, being defended by counsel, though none would have been allowed to him in a criminal court); and, whilst it might be compromised by the plaintiff², it could not be defeated by any pardon from the Crown. This anomalous remedy was not formally abolished until 1819; and so late as in 1818, in *Ashford v. Thornton*³, an accuser actually instituted an "Appeal." Even then the abolition was resisted by some of the most progressive politicians, on the ground that such proceedings afforded the only sure means by which over-zealous soldiers or constables, who acted with an illegal excess of violence, could be brought to punishment without the possibility of their being shielded by the Crown⁴. From this point of view, no less eminent a judge than Lord Holt had eulogised Appeals as "a true badge of English liberty."

But, though Appeals have been abolished, it still remains possible that the same wrongful act may be followed up by both civil and criminal proceedings. For almost every crime admits of being treated as a "tort," *i.e.* as a civil injury, so

¹ Thus proceedings to enforce payment of rates are (1) for a general district rate, civil (L. R. [1899] 1 Q. B. 273); yet (2) for a poor-rate, criminal (L. R. [1896] 2 Q. B. 344); though the ethical guilt and the evil to the community are alike in both cases.

² "An 'appeal' is a private suit, wholly under the control of the party suing. *Execution is at his option*. His sole object may be to get money"; (Bayley, J.)

³ 1 B. and Ald. 423. For the details of this remarkable case see *All the Year Round* for May, 1867.

⁴ See Bentham's *Works*, viii. 539.

that the person wronged by it can sue the wrong-doer for pecuniary compensation. Blackstone even goes so far as to say, universally, that every crime is thus also a private injury¹; but of course this cannot be the case with those offences which do not happen to injure any particular private individual. Of such offences there are three groups. There are the cases in which a crime affects the State alone; as where a man publishes a seditious libel or enlists recruits for the service of some foreign belligerent. Again, there are the cases in which, though the crime is aimed against a private individual, its course is checked before it has reached the point of doing any actual harm; as where an intending forger is charged only with "having in his possession a block for the purpose of forging a trade-mark," or with possessing bank-note paper without lawful excuse, or with engraving a bank-note plate without lawful excuse. And, thirdly, there are cases in which though a private individual does actually suffer by the offence, yet this sufferer is no other than the actual criminal (who, of course, cannot claim compensation from himself); as in cases of attempted suicide, or (under 34 and 35 Vict. c. 108) of a tramp's "wilfully destroying" his own clothes whilst receiving shelter in the casual ward of a workhouse.

In, however, the vast majority of cases, he who commits a crime does thereby cause actual hurt to the person or property of some other man; and whenever this is so, the crime is also a tort². But though most criminals are thus liable to be sued, in civil proceedings, for pecuniary compensation for the harm which they have done, such proceedings are rarely brought. For most crimes are committed by persons so poor that no compensation could be obtained from them. Hence libel and assault, since they are the crimes least unlikely to be committed by rich people, are the only crimes for which a resort to civil proceedings is at all common in practice; but they are very

¹ 4 Bl. Comm. 5.

² Thus after acquittal when indicted for assault, a man may still be sued civilly for damages for it; 12 East 415.

far from being (as is sometimes hastily inferred) the only crimes where it is possible. The victim of a rape has brought an action for damages against her ravisher¹; and the circumstances which give rise to a prosecution for bigamy would often support civil proceedings for the tort of Deceit. Criminal wrongs and civil wrongs thus are not sharply separated groups of acts; but are often one and the same act as viewed from different standpoints, the difference being one not of nature but only of relation. To ask concerning any occurrence, "Is this a crime or is it a tort?" is—to borrow Sir James Stephen's apt illustration—no wiser than it would be to ask concerning a man, "Is he a father or a son?" For he may well be both.

If we know any particular occurrence to be a crime, it is easy—as we have seen—to ascertain whether or not it is also a tort, by asking if it damages any assignable individual. But there is no corresponding test whereby, when we know an occurrence to be a tort, we can readily ascertain whether or not it is also a crime. We cannot go beyond the rough historical generalisation that Torts were erected into crimes whenever the law-making power had come to regard the mere civil remedy for them as being inadequate. Inadequate it may have been on account of their great immorality, or of their great hurtfulness to the community, or of the greatness of the temptation to commit them, or of the likelihood of their being committed by persons too poor² to pay pecuniary damages. The easiness of the legal transition from tort to crime is vividly illustrated by the ancient Norman custom of the "*Clameur de Haro*," still surviving in our Channel Islands, by which a person who is suffering from a tort may cause any further continuance of that tort to become an actual crime, by merely uttering, in the wrong-doer's presence, an archaic invocation of the protection of Duke Rollo³.

By a paradox, familiar to all readers of Sir Henry Maine's

¹ *S. v. S.*, 16 Cox 566.

² Thus the Musical Copyright Act, 1906, was enacted to check the sale of pirated music by penniless street-hawkers.

³ See M. Glasson's article on the *Clameur*, in *La Grande Encyclopédie*.

Ancient Law, the codes of archaic civilisations may equally well be described as utterly ignoring crime or as being mainly occupied with it. For whilst the chief task of a primitive lawgiver is to cope with those acts of serious violence which mature civilisations repress by criminal punishment, yet his only means of coping with them is by exacting the claims of the private individuals who have been injured. The idea of repressing them by a further sanction, imposed in the collective interests of the community, is not reached until a late stage of legal development. The process of evolution may sometimes be traced through successive periods. In the earliest, the State recognises the need for redress, but only as for a merely private wrong; and so the amount of redress, and sometimes even the mode of redress, are left to the discretion of the injured person or his relatives. Even the Mosaic legislation left this primitive Bedouin rule in force for every homicide that was wilful, and bade the elders of the murderer's own city "fetch him and deliver him into the hands of the Avenger of Blood" (Deut. xix. 12). Even within living memory popular sentiment in Corsica recognised these vendettas as permissible, if not even obligatory. In Abyssinia the penalty for manslaughter is death; but the family of the victim may (A.D. 1923) waive it by accepting money instead¹. A decided advance in civilisation is made when the penalty of any given class of crimes is specified and limited; a fine of sheep or cattle, it may be. The injured persons still retain the privilege of exacting it, but it is all that they can exact. A good instance is that law ascribed to Numa Pompilius which mitigated in this way the vengeance for mere manslaughter: "Si quis occidisset hominem, pro capite occisi agnatis ejus in concione offeret arietem²." And, nearer home, a more familiar instance may be found in the Anglo-Saxon wér-gild, claimable by the kinsmen of a murdered man, and nicely graduated according

¹ Rey's *Unconquered Abyssinia*, p. 117. Similarly in Tunis the first French code allowed (s. 216) a *prix du sang*, accepted by the victim's family, to release even a murderer.

² Clark's *Early Roman Law*, 44-50.

to his status; twelve hundred shillings for a thegn, but only two hundred for a villein, and forty for a slave, and less for a Welshman than for a Saxon¹. Later on, again, it comes to be perceived that when one member suffers the community suffer; and hence that a compensatory expiation is due not only to the victim and his kindred but also to the State. So perhaps a fine is exacted on behalf of the community, either in addition to or instead of the private one; and probably some person is specified who shall exact it. The fourth and final stage of the process² is reached when the State realises that her interest in the preservation of order is so great that she must no longer remain content with saying that those who violate order shall afterwards compensate her; she must now by severer threats deter them from committing any such violation. The idea of a true Punishment is thus made to supersede all idea of compensation to the community. It overshadows even the idea of compensation to the injured; though for some time the consent of the injured may perhaps be thought necessary, at the outset of prosecutions, to enable the public punishment to take precedence of the private penalty or supersede it. (Traces of that conception are traceable even now in our own English criminal courts when, in dealing with some slight offence, they mitigate the punishment "because the prosecutor does not press the case³," or they even give him leave to settle the matter and withdraw the prosecution.) A good example of the introduction of true punishment is afforded by the law, attributed to Numa Pompilius, which punished murder: "Si quis hominem liberum dolo sciens morti dedit, paricidas esto⁴." But no additional example is afforded by early Roman legislation, even when we come down to the XII Tables; unless it be in the penalty

¹ Pollock and Maitland's *Hist. Eng. Law*, i. 26, ii. 448. Maitland's *Domesday Book*, p. 31. Cf. Homer's "blood-price," Pope's *Iliad* ix. 632 and xviii. 497; and the dissertation in Butcher and Lang's *Odyssey*, p. 408.

² The stages of evolution are well illustrated in the Babylonian code of Hammurabi; see Dr Johns' cheap and excellent translation.

³ 8 Cr. App. R. 271.

⁴ Clark's *Early Roman Law*, p. 42.

of retaliation for a "membrum ruptum," but even this was perhaps regarded by the lawgivers rather as a source of gratification to the party originally maimed, than as a punishment by which the State sought to deter men from maiming its citizens. In like manner, the English conquerors of Ireland superseded the ancient fines for homicide by the punishment of death. They pronounced those Brehon fines to be "contrary both to God's law and man's"; yet it was only late in the twelfth century that such fines had been superseded in their own England¹. Punishments thus instituted in the interests of the State would at first be imposed by direct action of the State itself or its delegate; thus in early Rome each sentence was pronounced by a special *lex* of the great national assembly, the *Comitia* (see p. 5, *supra*). As time went on, the function of administering criminal justice would come to be delegated to representatives. Sir Henry Maine² has shewn how, in the typical case of Rome, the *Comitia* came to delegate criminal cases, one by one, each to a special committee (*quaestio*), nominated for the particular occasion; and later on, to adopt the practice of appointing these *quaestiones* for a period, with power to try all cases, of a given class, that might arise during that time; whilst, ultimately, they were appointed permanently, as true forensic Courts.

Even in England the process of turning private wrongs into public ones is not yet complete; but goes forward year by year, whenever any class of private wrong—or even of acts that have never yet been treated as wrongs at all—comes to inspire the community with new apprehension, either on account of its unusual frequency or of some new discovery of its ill effects. Thus it was not until Hanoverian reigns that the maiming or killing of another man's cattle, or the burning of his standing corn, were made crimes; though they were wrongs as injurious to the owner as theft, and to the community still more injurious than theft. It was not until 1857 that it was made a crime for a trustee to commit a breach

¹ Pollock and Maitland, II. 458.

² *Ancient Law*, ch. x.

of trust¹; and not until 1868 that it was made a crime for a partner to steal the partnership property². Every year sees Parliament create some new crime³; though, in most cases, of a character much more trivial than such instances as those just now quoted. Probably the multiplication of crimes would have gone on even more rapidly than it has done, but for the fact that various forms of misconduct, which otherwise would naturally have come to be restrained by criminal prohibitions, were already under an adequate deterrent sanction in the shape of some abnormal form of civil proceedings, such as an action for "exemplary damages⁴," or, again, for a penalty recoverable by the first informer⁵.

Whilst a quickened public conscience thus extends the criminal law, that law in its turn stimulates the public conscience; as has been vividly shewn during the past century in the instances of duelling, of cruelty to animals, and of bribery at elections. And the same advance in civilisation which expands the law of crime should see crime itself diminish—more forms of evil prohibited, but fewer evil acts committed.

As criminal law develops, it moreover scrutinises more closely the mental condition of offenders; both for the punishing and for the preventing of crimes. Primitive lawgivers looked to physical conduct; and concerned themselves very little with its physical cause. They punished an injury even if it were merely accidental; but ignored evil endeavours that fell short of accomplishment. We shall see, in Chapters III, IV, V, how great a contrast in this respect is presented by modern law.

¹ 20 and 21 Vict. c. 54.

² 31 and 32 Vict. c. 116.

³ Cf. the Prevention of Corruption Act, 1906, making criminal certain acts of bribing commercial agents; the Public Health Act, 1907, s. 59, punishing any person who, when he knows he has an infectious disease, borrows a book from a public library; the Public Meeting Act, 1908, punishing any one who disturbs a public meeting in order to prevent the transaction of its business; the Coal Mines Regulation Act, 1908, punishing any coal-miner who remains underground, for the purpose of work, for more than eight hours in one day; the Copyright Act, 1911, making the violation of a known copyright a crime.

⁴ *Supra*, p. 12.

⁵ *Supra*, p. 7.

CHAPTER II

THE PURPOSE OF CRIMINAL PUNISHMENT

THE inquiry will naturally suggest itself: Under what circumstances does it become wise thus to issue a new criminal prohibition? All modern legislatures are constantly being requested to pass enactments punishing some prevalent practice which the petitioners consider to be injurious to the community and which, whether from selfish or from philanthropic motives, they desire to see repressed. But Bentham¹ has vividly shewn that a lawgiver is not justified in yielding to such appeals merely because it is established that the practice in question does really injure his subjects. Before using threats of criminal penalties to suppress a noxious form of conduct, the legislator should satisfy himself upon no fewer than six points.

1. The objectionable practice should be productive not merely of evils, but of evils so great as to counterbalance the suffering, direct and indirect, which the infliction of criminal punishment necessarily involves. Hence he will not make a crime of mere Lying; unless it has caused a pecuniary loss to the deceived person and thereby become aggravated into Fraud.

2. It should admit of being defined with legal precision. On this ground, such vices as ingratitude, or extravagance, or gluttony (unlike drunkenness), do not admit of being punished criminally.

3. It should admit of being proved by cogent evidence. The untrustworthiness of the only available evidence has been one great cause of the reluctance of experienced legislators to deal criminally with offences that are purely mental, like heresy and conspiracy and the "compassing" of treason;

¹ Bentham's *Principles of Morals and Legislation*, chap. xv.; and his *Principles of Penal Law*, II. 1. 4. Cf. *Quarterly Review*, Jan. 1923.

and even with those which consist of merely oral utterances (hard to remember with precision) like slander.

4. Moreover this evidence should be such as can usually be obtained without impairing the privacy and confidence of domestic life. Hence in England, the criminal law does not punish drunkenness, unless seen in a public place.

5. And even if an offence is found to satisfy all these intrinsic conditions of illegality, the lawgiver should not prohibit it, until he has ascertained to what extent it is reprobated by the current feelings of the community. For, on the one hand, that reprobation may be sufficiently severe to remove all necessity for those more clumsy and costly restraints which legal prohibition would impose; just as in England at the present time, it is really by public sentiment, and not by the unpopular Lord's Day Act of Charles II, that our habitual abstinence from trade and labour on Sundays is secured. Or, on the other hand—as has sometimes been shewn by prosecutions, under the same statute, of bakers and crossing-sweepers for pursuing their callings on Sundays—public opinion may regard an offence so leniently that the fact of a man's having to undergo legal penalties for it, would only serve to secure him such a widespread sympathy as would countervail the deterrent effect of the punishment. Hence whist-drives are prosecuted only fitfully. Criminal legislation must only aim at expressing, as Prof. Ottley says, "the judgment of the *average* conscience as to the *minimum* standard of Right." To elevate the moral standard of the less orderly classes of the community is undoubtedly one of the functions of the criminal law; but it is a function which must be discharged slowly and cautiously. For attempts at a rapid and premature elevation are apt, as in the case of the Puritan legislation of the Cromwellian period, to provoke a reaction which defeats their aim. An admirable illustration of the caution which a wise legislator exercises in undertaking the tasks that moral reformers commend to him, is afforded by the English law of sexual offences (*infra*, p. 144). It does not

inflict criminal penalties upon all those acts which the ecclesiastical law prohibits and used to punish, and which the law of contract still visits fitly with the sanction of Nullity. It selects out of them, for criminal prohibition, those alone in which there is also present some further element—whether of abnormality or violence or fraud or widespread combination—that provokes such a general popular disgust as will make it certain that prosecutors and witnesses and jurymen will be content to see the prohibition actually enforced.

6. Whenever any form of objectionable conduct satisfies the five foregoing requisites, it is clear that the legislature should prohibit it. But still the prohibition need not be a criminal one. It would be superfluous cruelty to inflict criminal penalties where adequate protection can be secured to the community by the milder sanctions which civil courts can wield.

Hence breaches of contract have rarely been criminally dealt with. For, even when intentional, they are seldom accompanied by any great degree of wickedness or any great public risk; or by any great temptation which the fear of an action for damages would not be likely to counterbalance; or by any ill effects to the other contracting party which such an action could not repair. It has, however, been made a crime for a workman to break his contract of service whenever the probable consequences will be to endanger life or to expose valuable property to serious injury; (38 and 39 Vict. c. 86). Again, violations of the rights of property, whenever they are merely unintentional, are usually sufficiently restrained by the fear of a mere civil sanction, viz. the payment to the injured person of a sum of money co-extensive with the loss that has been inflicted, and of a further sum towards the “costs” which he has incurred by the litigation. But there are other forms of wrong-doing upon which the fear of damages and costs, or even of such mild forms of imprisonment as a civil court can inflict for breach of any injunction

which it has laid upon a defendant, do not impose an adequate restraint. Thus the case may be one in which the offender belongs to a class too poor to have the means of paying pecuniary compensation. Or the harm done to the immediate victim of the crime may be such that it cannot be redressed by pecuniary compensation; as in the case of murder. Or, as is far more commonly the case, the gravity of the offence, or the strength of the temptation to it, may be such that every instance of its commission causes a widespread sense of insecurity and alarm. In that case there is, beyond the immediate and direct victim who has been robbed or wounded, an unknown group of "indirect" sufferers; who, if only because they are unascertainable, cannot have pecuniary compensation given them for the suffering that has been caused to them. In such cases the lawgiver must adopt some more stringent remedy. He may, for instance, take precautions for securing some Antecedent interference which will check the wrong-doer at the incipient manifestations of his criminal purpose; interference such as our Saxon ancestors attempted to provide by their system of Frankpledge, which made it the direct interest of a man's neighbours to keep him from crime, and as Sir Robert Peel provided in the nineteenth century when he secured the establishment of the vigilant force of policemen with whom even the current slang of the streets still associates his two names. Or he may adopt the easier and more common, but less effective, method of a Retrospective interference; by holding out threats that, whenever a wrong has been actually committed, the wrong-doer shall incur punishment.

To check an offence by thus associating with the idea of it a deterrent sense of Terror, is possible only when both of two conditions are present. For (1) the wrong-doer must know he is doing wrong; for otherwise a terror would not affect him, and so not deter. It is on this ground that immunity from punishment is conceded to a man who has taken another's property by mistake for his own, or has committed a murder

in a fit of insanity. Nor does it suffice that he knows that what he is doing is wrong, unless also (2) he can "help" doing wrong: for a man ought not to be punished for acts which he was not, both physically and mentally, capable of avoiding; since the fear of punishment could not have the effect of making him avoid them. (Hence comes the reluctance which lawgivers have often shewn to punish men who have been coerced by threats of death to aid in a rebellion, or who have been hurried into a theft by some kleptomaniacal impulse.) When these two conditions are satisfied, so that the restraint of Terror becomes justifiable, such a restraint is supplied by criminal law very efficiently. For, as we have already seen in our review of the peculiarities which seem to distinguish criminal procedure from civil, the former exposes the offender to more numerous hazards of having litigation instituted against him, as well as to far severer "sanctions" in case of that litigation succeeding; and, at the same time, it diminishes his chances of having these penalties remitted.

According to the most generally accepted writers—as for instance Beccaria, Blackstone, Romilly, Paley, Feuerbach—this hope of preventing the repetition of the offence is not only a main object, but the sole permissible object, of inflicting a criminal punishment¹. Hence Abp. Whately vividly says, "Every instance of the infliction of a punishment is an instance of the failure of that punishment"; for it is a case in which the threat of it has not proved perfectly deterrent. Whately here embodies an important truth; which had been exaggerated by Whichcote into the over-statement that "The execution of malefactors is no more to the credit of rulers than the death of patients is to the credit of physicians." But, whereas the death of one patient never constitutes any step towards the cure of others, the execution of a man, whom the fear of punishment has not deterred from murder,

¹ Hence Burnet, J., replied to a protesting prisoner: "Thou art to be hanged, not for having stolen the horse, but in order that other horses may not be stolen."

may nevertheless help to deter others. Hence there was sound logic in the often-derided exclamation of the shipwrecked crew who, when they saw a gibbet on the beach where they were washed ashore, cried "Thank God, we've reached a civilised country!"

Criminal punishment may effect the prevention of crimes in at least three different ways.

(a) It may act on the body of the offender, so as to deprive him, either temporarily or permanently, of the power to repeat the offence; as by imprisoning him, or by death.

(b) It may act on the offender's mind; counteracting his criminal habits by the terror it inspires, or even eradicating them by training him to habits of industry and a sense of duty—"awakening a 'serve me right' feeling" (Lord Haldane). The reforms in prison-management which, mainly under the influence of Howard's initiative, have been carried out during the past century and a half, have been largely directed towards the development of the educational influences that can be thus attempted during imprisonment. There are indeed some criminologists, especially in America, who hold this reformation of the individual punished to be the only legitimate object of punishment (though an object very rarely achieved)—an extreme view which denies to the State so simple and obvious a right as that of self-preservation.

(c) Its chief aim is to act on the minds of others, if only in one of the ways in which it may act on his mind; for, though it cannot amend them by education, it may at least deter them by fear¹. It is in this way that pecuniary penalties help

¹ That the fear of punishment *can* deter is shewn by the fall in offences against the Education Act when the fine was raised from 5s. to 20s.; and still more vividly by its efficacy in the training of animals and even of fishes; a pike can by it be taught to swim amongst tench innocuously, or a flea to abstain from jumping. See p. 538 *infra*. The legislature showed confidence in that efficacy by the Dangerous Drugs Act, 1923 (as to traffic in cocaine or prepared opium), raising the incarceration imposed by the earlier Act from six months' imprisonment to ten years' penal servitude.

But were Deterrence the *sole* object, it would sometimes impose harsher punishments than public opinion (which usually thinks mainly of ethical Retribution) would tolerate.

to prevent crime, though incapable of preventing it either in mode (a) or as an educative influence.

But beyond this paramount and universally admitted object of punishment, the prevention of crime, it may be questioned whether there are not two further purposes which the legislator may legitimately desire to attain as results, though only minor results, of punishment.

One of these—distasteful as is the suggestion of it to the great majority of modern writers—is the gratification of the feelings of the persons injured. In early law this was undoubtedly an object, often indeed the paramount object, of punishment¹. Even in Imperial Rome, hanging in chains was regarded as a satisfaction to the kindred of the injured, “ut sit solatio cognatis”; and even in England, so recently as 1741, a royal order was made for a hanging in chains “on petition of the relations of the deceased².” The current morality of modern days generally views these feelings of resentment with disapproval. Yet some eminent Utilitarians, like Bentham³ (and apparently not without support from even so dissimilar a writer as Bishop Butler), have considered them not unworthy of having formal legal provision made for their gratification. Hence no less recent and no less eminent a jurist than Sir James Stephen maintains that criminal procedure may justly be regarded as being to Resentment what marriage is to Affection—the legal provision for an inevitable impulse of human nature⁴. And a very general, if an unconscious, recognition of this view may be found in the common judicial practice, in minor offences, of giving a lighter sentence⁵ whenever the prosecutor “does not press the case”: and again, in the widespread reluctance to punish crimes that are not prosecuted until several years after their

¹ Holmes, *Common Law*, p. 34.

² Prof. Amos' *Ruins of Time*, p. 23.

³ *Principles of Penal Code*, II. 16; *Sermons at the Rolls Chapel*, VIII. and IX., cf. Henry Sidgwick's *Lectures on Ethics*, p. 357.

⁴ I have known an examinee reproduce this analogy in the startling form that “Stephen maintains that marriage is to love what punishment is to crime.”

⁵ Cf. 8 Cr. App. R. at p. 271.

commission. The modern community, like those ancient ones which Maine depicts¹, measures here its own public vengeance by the resentment which the victim of the crime entertains. The same impulse occasionally reveals itself, in the "Lynch law" of the southern United States, when the mob that condemns a negro ravisher to the flames directs the outraged woman herself to kindle the first torch.

There is a second subsidiary purpose of Punishment, which, though not so distasteful as the foregoing one, is almost equally often ignored by modern jurists. This consists in the effects of Punishment in elevating the moral feelings of the community at large. For men's knowledge that a wrong-doer has been detected, and punished, gratifies—and thereby strengthens—their disinterested feelings of moral indignation. They feel, as Hegel has it, that "wrong contradicts right, but punishment contradicts the contradiction." Mediæval law made prominent this effect of punishment. For more than a century past, the tendency of jurists has been to disregard it; but it occupies a large place in the judgment of ordinary men. It has full recognition from practical lawyers so eminent as Sir Edward Fry², Mr Justice Wright³, and Lord Justice Kennedy⁴. Professor Sidgwick testifies: "We have long outgrown the stage at which the normal reparation given to the injured consisted in retribution inflicted on the wrong-doer. It was once thought as clearly right to requite injuries as to repay benefits; but Socrates and Plato repudiated this, and said that it could never be right to harm anyone, however he may have harmed us. Yet though we accept this view of Individual resentment, we seem to keep the older view when the resentment is universalised, *i.e.* in Criminal Justice. For the principle that punishment should be merely deterrent and reformatory is, I think, too purely utilitarian for current opinion. That opinion seems still to incline to the

¹ *Ancient Law*, ch. x.

² *Studies by the Way*, pp. 40–71. Cf. *Nineteenth Century*, 1902, p. 848.

³ *Draft Jamaica Criminal Code*, p. 129.

⁴ *Law Magazine*, Nov. 1899.

view that a man who has done wrong *ought* to suffer pain in return, even if no benefit result to him or to others from the pain; and that justice requires this; although the individual wronged ought not to seek or desire to inflict the pain¹." It may however be doubted whether any such qualification as that contained in the last fourteen words is really imposed by current opinion².

The view of most people who are not lawyers is thus much the same as that maintained by no less a philosopher than Victor Cousin, in his terse epigram³ that "punishment is not just because it deters, but it deters because it is felt to be just." They hold with Lord Justice Fry that "the object of punishment is to adjust the suffering to the sin."

And accepted judicial practice, when carefully examined, contains much to corroborate this view, and to shew that Prevention is not the sole object of punishment. For were it so, then (1) an absolutely hardened and incorrigible offender ought to go scot-free, instead of being the most severely punished of all⁴. So that in a community utterly defiant of the law such discipline ought to be altogether abandoned as useless. Moreover, if prevention be all, then (2) we should have to consider force of Temptation as being usually reason for increasing the punishment⁵; yet judges have generally made it a ground of extenuation⁶, as when a thief pleads that he stole to satisfy his hunger, or a slayer that he struck

¹ *Methods of Ethics*, p. 280.

² When, in 1903, the son of Mr Dexter, of New York, was murdered, the bereaved father announced his intention to spend a million dollars, if necessary, to bring the murderer to justice. Yet would current opinion blame this exceptional zeal?

³ Preface to the *Gorgias* of Plato. Cf. Mr Lilly, cited p. 36 *infra*.

⁴ Thus an able writer (Dr G. V. Poore, *Medical Jurisprudence*, p. 324, ed. 1901) expressly maintains that "In the case of young offenders, one should make an example of them;...but when we deal with a hardened sinner...the sooner we banish from our minds any idea of vengeance the better." To most persons this will appear a precise inversion of the proper contrast.

⁵ As in thefts of goods necessarily *exposed*; see p. 221 *infra*.

⁶ Cf. Prof. Maitland on this paradox; *Mind*, v. 259.

under the provocation of a blow. And (8) on the other hand, by a divergence in the opposite direction, the reluctance with which English law admits Duress by any threats to be an excuse for a crime committed by the intimidated agent, and its modern refusal¹ to treat Necessity as an excuse for homicide, even in the extreme case of a starving crew of shipwrecked men, shew again that deterrence cannot be the sole object of punishment; for punishment is thus inflicted where the fear of it could not have sufficed to deter. Indeed the sense of Ethical Retribution seems to play a part even in non-criminal law; for if, in some action of debt or trespass, the judge, in order to save himself trouble by shortening the suit, should offer to pay the plaintiff the damages out of his own pocket, an ordinary plaintiff would feel dissatisfied. Vivid proofs of the influence formerly exercised on criminal law by this idea of Ethical Retribution, may be found in the fact that it sometimes drove the tribunals into the illogical excess of punishing, from mere blind association of ideas, "crimes" committed by non-ethical agents. Instances occur in the mediæval punishments sometimes inflicted on animals for homicide²; and in the "piacularity" attached in ancient Greece to even inanimate instruments of death, as when, according to Pausanias, the Prytanes at Athens condemned to penal destruction lifeless objects that had accidentally slain a man³—a feeling which reappears in the "Deodand" of the old English law of Homicide⁴.

On the other hand, the fact that temptation does not always extenuate, inasmuch as in some classes of offences (especially political and military ones) lawgivers often make it a reason for threatening a graver punishment, shews that the principle of Ethical Retribution is not the only one that

¹ *Reg. v. Dudley and Stephens*, L. R., 14 Q. B. D. 273. *Infra*, p. 76.

² See Mr G. P. Evans' treatise, "The criminal prosecution of Animals." In 1595 the city-court of Leyden sentenced a dog that had killed a man "to be hanged, and to remain hanging on the gallows, to the deterring of all other dogs; and his goods, if any, to be forfeited"; *South African Law Journal* for 1907, p. 233.

³ *Itinerary*, Bk. I. c. 28, s. 11.

⁴ *Infra*, p. 106.

guides them, and that they take account also of the necessity of Prevention. A further proof may be found in the comparatively severe punishment inflicted on criminals who through mere negligence (*e.g.* a careless engine-driver), or mere intoxication (*e.g.* a mother overlaying a child in drunken sleep), so that the purely ethical blame is small, have caused some fatal injury. The same lesson is taught, too, on the other hand, by some cases where the divergence from mere Ethics is in the opposite direction; as in the English rules that mere Intention to commit a crime is never punished, and that even the Attempt to commit it is punished but slightly. For in either case the ethical guilt may be just as great as if the guilty scheme had not happened to become frustrated¹.

It cannot, however, be said that the theories of criminal Punishment current amongst either our judges or our legislators have assumed, even at the present day, either a coherent or even a stable form². To this, in part, is due the fact that—as will be shewn in Chapter XXXII—our practical methods of applying punishment are themselves still in a stage which can only be regarded as one of experiment and transition.

¹ Hence in French law an attempt to commit any grave crime, which has miscarried "only through circumstances independent of the criminal's own will," is punishable as severely as the consummated offence.

² The student should refer to the discussion of the Purposes of Punishment in Salmond's *Jurisprudence*, 7th ed. ss. 28-31. He may compare with it the views of J. S. Mill (*On Hamilton*, p. 581); Dr Rashdall (*Theory of Good and Evil*, i. 284-312); and of Mr W. S. Lilly (*Idola Fori*, pp. 233-240) who regards Retribution as being "first and beyond all things" the dominant aim of Punishment.

Dr Roscoe Pound, though dissenting from this view, concedes that "Anglo-American lawyers commonly regard the satisfaction of public desires for vengeance as both a legitimate, and a practically necessary, end of penal treatment" (*Criminal Justice in Cleveland*, p. 575; ed. 1922).

CHAPTER III

THE MENTAL ELEMENT IN CRIME

WE have already seen how closely the idea of moral Wickedness is interwoven with that of legal crime; and also (p. 29) how deterrence is dependent upon certain conditions of Mind. Hence to constitute a crime and subject the offender to a liability to punishment, *i.e.* to produce legal criminal "guilt" (or, in Austin's terminology "imputability"), a mental as well as a physical element is necessary¹. Thus, to use a maxim (which has been familiar to English lawyers for nearly eight hundred years), "*Actus non facit reum nisi mens sit rea*"². Accordingly, every crime involves:

(1) A particular physical condition. Blackstone calls it "a vicious act"³. As, however, it may consist of *inaction* the term "vicious conduct" would be more appropriate.

(2) A particular mental condition causing this physical condition. Blackstone calls it "a vicious will"⁴. It is not, however, a "will" in Austin's sense of that word; but is closely akin to, and includes, his "Intention."

In Ethics, of course, this second condition would of itself suffice to constitute guilt. Hence⁵ on Garrick's declaring that whenever he acted Richard III he felt like a murderer, Dr Johnson, as a moral philosopher, retorted, "Then he ought to be hanged whenever he acts it." But there is no such searching severity in the rules of Law. They, whether civil or even criminal, never inflict penalties upon mere internal feeling, when it has produced no result in external

¹ See Austin's *Lectures on Jurisprudence*, xviii., xxvi.; Clark's *Analysis of Criminal Liability*; Stephen's *General View of the Criminal Law*, ch. III.; Stephen's *Hist. Cr. Law*, II. 94-123.

² Prof. Maitland has traced the use of this aphorism in England back to the *Leges Henrici Primi*, v. 28, and its origin to an echo of some words of St Augustine, who says of Perjury "*ream linguam non facit nisi mens rea*." *Hist. Eng. Law*, II. 475.

³ 4 Bl. Comm. 21.

⁴ *Ibid.*

⁵ Boswell, *anno* 1783.

conduct. So a merely mental condition—Shakespeare’s “wicked meaning in a lawful deed”—is practically never made a crime. If a man takes an umbrella from a stand at his club, meaning to steal it, but finds that it is his own, he commits no crime¹. It is true that there appears at first sight to be an important exception to this principle, in that form of High Treason called “compassing the King’s death².” But the exception is only apparent; for the Statute of Treasons goes on to make it essential to a conviction that some “overt act” should have been committed towards accomplishing the end contemplated. In another apparent exception, the misdemeanor of Conspiracy³, it is true that the Conspiracy itself is a purely mental state—the mere agreement of two men’s minds—and that here, unlike Treason, it is not necessary to a conviction that any act should have been done towards carrying out the agreement; but it would be impossible for two men to come to an agreement without communicating to each other their common intentions by speech or gesture, and thus even in conspiracy a physical act is always present. Hence conspiracies are amongst the commonest instances of the “overt acts” relied upon in charges of Treason.

A still greater divergence from Ethics will be remarked, if we turn from the criminal to the non-criminal branches of Law; for they often inflict their sanctions on mere external conduct, which is not the result of any blameable state of mind. Thus,

(1) In breaches of Contract, the mental and moral condition of the defaulter has no effect upon the question of his liability or non-liability; unless the very language of the contract implies that it can only be broken by some act which is wilful. Thus a wife’s covenant in a separation deed “not to molest” her husband, is held not to be broken by anything

¹ Or if, not knowing that his wife is dead, he contracts what he believes to be a bigamous marriage. Cf. the American traitor, p. 268 *infra*.

² *Infra*, p. 267; Stephen, *Digest of Criminal Law*, Art. 52, 53.

³ *Infra*, ch. xviii.; Stephen, *Digest of Criminal Law*, Art. 49.

but an intentional annoying of him. And, similarly, if the defaulter be liable, the wilfulness or wickedness of his conduct will not affect the amount of the damages to be recovered from him; (except in the case¹ of a breach of promise to marry).

(2) And in Torts the mental condition of the wrong-doer is ignored very largely. But not so nearly universally as in the law of Contract²; for there are a few classes of tort (*e.g.* malicious prosecution) in which it is an indispensable element of liability; and in very many (if not, indeed, in all³) of the remaining classes, namely the torts in which liability can exist without it, it still may be taken into account in estimating the amount of the damages.

But in Criminal law, as we have seen, no external conduct, however serious or even fatal its consequences may have been, is ever punished unless it has been produced by some form or other of *mens rea*. It is not, however, necessary that the offender should have intended to commit the particular crime which he has committed; (nor indeed that he should have intended to commit any crime at all). In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed as consisting simply in "intending to do what you know to be illegal⁴." It admits, however, of a minuter description. Thus, in the scientific analysis given by Professor E. C. Clark⁵, it is shewn to require:

(1) The power of *Volition*; *i.e.* the offender must be able to "help doing" what he does. This faculty is absent

¹ Anson on Contracts, ch. xvii. § 2 (3).

² Salmond on Torts, pp. 9-15. So in divorce proceedings a wife who has been ravished is not treated as an adulteress (*Long v. Long*, 15 P. D. 218); "there cannot be an innocent 'adultery'."

³ Halsbury's *Laws of England*, x. 307.

⁴ *I.e.* what you know to belong to a class of conduct that is (*whether you know it or not*) forbidden by law. Cf. p. 68 (3).

⁵ *Criminal Liability*, pp. 80, 109. Cf. the analysis made by Sir James Stephen in his *History of Criminal Law*, II. ch. xviii., and his *General View of the Criminal Law*, 1st ed. ch. iii., 2nd ed. ch. v. Sir J. W. Salmond's *Jurisprudence*, chs. xvii., xviii., xix., should be carefully studied.

in persons who are asleep¹, or are subject to physical compulsion or to duress by threats, or whose conduct is due to accident or ignorance: and it is also absent in *some* cases of insanity, of drunkenness, and of infancy. Where it is absent, an immunity from criminal punishment will consequently arise.

(2) *Knowledge* that what the offender is doing is wrong; wrong either intrinsically, or, at any rate, in prospect of such consequences as he has grounds for foreseeing. There will be an absence of such knowledge in very early infancy, or in the case of some delusions as to the supernatural; and immunity, accordingly, will arise.

(3) In such crimes as consist of conduct that is not intrinsically unlawful, but becomes criminal only when certain consequences ensue, there must further be the power of *Foresight* of these consequences. It is sufficient that he merely had this power, *i.e.* that he would have expected these consequences had he but paid proper attention to his surroundings; yet if this be all, he will usually be placed by criminal law in a position of only minor liability. But, if on the other hand, he actually foresaw them (still more, if he both foresaw and desired them, *i.e.* in Bentham's phrase, intended them "directly"), the law will probably² impose on him a major liability. The power of foresight may be absent in infancy, even in late infancy; and in some forms of insanity.

It might seem that a rule thus rendering the existence of a complex mental element necessary to create legal liability, would usually cause a prosecutor much difficulty in obtaining evidence of it. For, to borrow the saying of a mediæval judge, which Sir Frederick Pollock has made familiar to modern readers, "the thought of man is not triable, for the Devil himself knoweth not the thought of man³." But this difficulty

¹ "If a man walking in his sleep do something, it is not his *act* at all"; Lord Hewart, L.C.J., May 25, 1922.

² Cf. p. 149 *infra*.

³ Brian, C. J., Y. B. 17 Edw. IV. fo. 2. "Le diable n'ad conusance de l'entent de home."

seldom arises in practice; for in most cases the law regards the criminal act itself as sufficient *primâ facie* proof of the presence of this *mens rea*. Every sane adult is presumed to intend the natural consequences of his conduct¹.

We have seen that criminal liability may exist although the offender had no intention to commit the particular crime which he did in fact commit, and that it suffices if he had an intention to commit a crime at all, whatever it were, or even an act that was simply illegal without being criminal. But there remains a further question—whether English law does not even go so far as to permit a still slighter degree of *mens rea* to suffice, viz. an intention to commit some act that is wrong as a breach of the accepted rules of Morality, even though it be not a breach of Law at all. This question was discussed in the elaborately considered case of *Reg. v. Prince*², which deserves the most careful attention of the student. Prince had abducted from her father a girl under the age of sixteen; but in the belief, on adequate grounds, that she was eighteen (in which case the abduction would not have been a crime). It was held by Brett, J. (afterwards Lord Esher, M.R.), that to constitute criminal *mens rea* there must always be an intent to commit some *criminal* offence. The rest of the court, however (fifteen judges), decided that, upon the construction of the particular statute under which the prisoner Prince was indicted, his conduct was not excused by the fact that he did not know, and had no reasonable grounds for supposing, that he was committing any crime at all. Moreover, independently of the terms of that particular statute, most (or, probably, all) of these fifteen differed from Lord Esher on the general rule of criminal liability; and were agreed in the view that an intention to do anything that is wrong legally, even as a mere civil tort and not as a crime at all, would be a sufficient *mens rea*. Indeed eight of the fifteen,

¹ Cf. p. 333, *infra*; *Rex v. Sheppard*, R. and R. 169 (K. S. C. 463).

² L. R., 2 C. C. R. 154 (K. S. C. 21).

in a judgment delivered by Bramwell, B.¹, expressly went even beyond this; laying down a third view, according to which there is a sufficient *mens rea* wherever there is an intention to do anything that is wrong *morally*, even though legally it be quite innocent, both criminally and civilly. If this opinion be correct, the rule as to *mens rea* will simply be that any man who does any act which he knows to be immoral must take the risk of its turning out, from circumstances not contemplated by him, to be in fact criminal also. This third view has great authority from having been enunciated by so great a number of judges; and it is approved by eminent text-writers. Yet it must be remembered that it was only an *obiter dictum*; being unnecessary for the particular appeal, as there the circumstances actually known to the prisoner made his conduct not merely immoral but also legally actionable², as a tort. And it is not easy to reconcile this dictum with the express decision in *Reg. v. Hibbert*³; which none of the judges in *Reg. v. Prince* seem to have wished to overrule. Moreover the dictum has the inconvenience of substituting the vagueness of an ethical standard for the precision of a legal one.

Had Prince's mistake lain in a reasonable belief that he had the girl's father's consent, that mistake would (see p. 66, II. (1) *infra*) have entitled him to an acquittal.

Hitherto we have spoken only of the degree of *mens rea* required in the general run of crimes. But there are also crimes (usually grave ones) in which a higher degree is necessary. And, on the other hand, there are some (usually of a petty character) in which a less degree than the ordinary one will suffice. Let us consider these two extremes.

A more complex and special (and therefore more guilty)

¹ L. R., 2 C. C. R. at p. 173 (K. S. C. at p. 22). Cf. L. R. [1899] 1 Q. B. D. at p. 830.

² See *per Denman, J.*, at p. 178 (K. S. C. at p. 25).

³ L. R., 1 C. C. R. 184; cf. *Reg. v. Green* (3 F. and F. 274) where Martin, B., directed an acquittal, though pronouncing the abductors' conduct "very immoral." Cf. Lord Esher's "that which *the law* has forbidden" (14 Q. B. D. at p. 689); Irish L. R. [1908] 2 K.B. 425; Stroud, *Mens Rea*, pp. 29, 37.

state of mind than the usual *mens rea* is required for some particular crimes, sometimes by the common law—as in the case of murder, what is technically called “malice aforethought” being there necessary—and sometimes by statute, as in the cases of wounding “with intent to disfigure,” and of wounding “with intent to do grievous bodily harm.” (But with regard to statutory crimes it should here be noted that although the definitions of them often contain words specifying some mental condition—such as “knowingly,” “maliciously,” “wilfully,” “negligently,” “fraudulently”—yet words so general seldom add in any way to the degree of *mens rea* requisite¹. Usually they merely alter the burden of proof with regard to it; their effect being to throw on the Crown the obligation of proving the ordinary *mens rea*² by further evidence than that mere inference from the *actus reus* which, as we have already seen, is ordinarily sufficient to prove it. Such evidence may consist, for instance, in expressions of vindictive feeling, or in previous injurious acts nearly identical with the present one; thus negating the probability of accident or carelessness or ignorance.)

Conversely, some less complex and less guilty state of mind than the usual *mens rea* is sometimes by statutory enactment—but only once by the common law—made sufficient for the mental element in criminal guilt. Such statutory offences deserve consideration, not only because of their singular character, but also because they are steadily increasing both in number and in importance. Yet the legislature is usually averse to creating them except where (1) the penalty incurred is not great (usually not more than a petty fine imposed by a petty tribunal), but (2) the damage caused to the public by the offence is, in comparison with the penalty, very great;

¹ For they require only what the *actus reus* itself suggests.

² Thus by 10 Edw. VII. c. 24 publicans are forbidden to (1) “supply” refreshments to a constable on duty, or (2) “*knowingly* harbour” him. Yet guilty knowledge is equally necessary in both cases; the only difference being that in case (2) the prosecution must prove knowledge, whilst in (1) the accused must disprove it.

and where, at the same time, (3) the offence is such that there would usually be peculiar difficulty in obtaining adequate evidence of the ordinary *mens rea*, if that degree of guilt were to be required.

Thus where on ordinary principles there would be no guilt unless the offender actually knew all the circumstances under which he acted (or, at any rate, had wilfully and deliberately abstained from coming to know them), exceptional statutes sometimes make him guilty if, before acting, he merely failed to take effective *care to obtain* knowledge of the circumstances. The following are instances of this exceptional kind of criminal liability:

(a) An undischarged bankrupt's obtaining credit for £10 or upwards, without disclosing that he is an undischarged bankrupt; even though he had directed his agent to disclose it, and had reasonable grounds for believing that the agent had done so¹.

(b) Keeping two or more lunatics without a license; though without knowing the persons to be lunatics².

(c) Possessing, for sale, unsound meat; though without knowing it to be unsound³.

(d) Selling an adulterated article of food; though without knowing it to be adulterated⁴.

(e) Selling intoxicating liquor to a drunken person; though without noticing that he was drunk⁵.

In these cases of an absolute liability, from the difficulty of obtaining legal evidence of the offender's knowledge of one portion of his *actus reus* (e.g. the adulteration, or the drunkenness), something much less than actual knowledge is allowed to suffice in respect of that portion. But for all the rest of the

¹ *Rex v. Duke of Leinster*, L. R. [1924] 1 K. B. 311; cf. p. 422 *infra*.

² *Reg. v. Bishop*, L. R., 5 Q. B. D. 259.

³ *Hobbs v. Corporation of Winchester*, L. R. [1910] 2 K. B. 471.

⁴ *Betts v. Armstead*, L. R., 20 Q. B. D. 771; *Goulden v. Rook*, L. R. [1901] 2 K. B. 290. *Laird v. Dobell*, L. R. [1906] 1 K. B. 131, is very strong. Contrast *Derbyshire v. Houlston*, L. R. [1897] 1 Q. B. 772.

⁵ *Cundy v. Lecocq*, L. R., 13 Q. B. D. 207.

actus reus (e.g. the selling, or the supplying), an ordinary *mens rea* is still necessary. That is to say, the offender must have actually known that he went through the act of selling; though it will suffice that he merely neglected the means of coming to know that the butter sold was adulterated, or the purchaser of the gin was intoxicated. Of course the absence of full *mens rea* may mitigate the sentence.

Indeed, even a still slighter degree of *mens rea* than this is sometimes allowed to suffice. For even when an offence is of such a kind as not to be punishable unless committed with full knowledge of its circumstances, it occasionally happens that an offender is by statute made liable to be punished for it; in spite of the fact that it was not he, but only some servant of his, that actually knew the circumstances. To punish such a man is a startling departure from the general rule of law. For the utmost moral blame that can be imputed to him is the comparatively trivial omission of not having originally secured a trustworthy servant and of not having subsequently kept him under constant supervision. Hence, in the case of all ordinary offences, the law does not regard a master as having any such connexion with acts done by his servant as will involve him in any *criminal* liability for them (whatever may be his liability in a *civil* action of tort or contract), unless he had himself actually authorised them. And to render him liable criminally this authorisation must have been given either expressly or else by a general authority couched in terms so wide as to imply permission to execute it even criminally¹. Thus, if a bargeman steers his barge so carelessly that he sinks a skiff and drowns the oarsman, or a chemist's shopman carelessly puts a poison into the medicine he makes up, this negligence of his may involve his master in a civil liability, but not in any criminal one.

So fundamental is this rule that the common law seems never to have deviated from it, except in one instance, and this only

¹ *Rex v. Huggins*, 2 Ld. Raymond 1574 (K. S. C. 35); *Hardcastle v. Bielby*, L. R. [1892] 1 Q. B. 709; *Newman v. Jones*, L. R., 17 Q. B. D. 132.

an anomalous offence where the prosecution is criminal merely in point of form, and in substance and effect is only a civil proceeding¹; its object usually being not Punishment but simply the cessation of the offence. The offence in question is that of a public nuisance (*i.e.* one from which no particular individual incurs any special damage). In the case of any *private* nuisance, as the remedy is by a civil action, the master is liable, under the ordinary civil rule, for all the acts of his servant done in the course of his employment; even though they may have been done without the master's knowledge and contrary to his general orders². For public nuisances, on the other hand, no civil action can be brought, but only an indictment. There would therefore often be much greater difficulty in obtaining effectual redress for them than for the more trivial class of nuisances, were not the master's liability for his servant's conduct made as general as in the case of mere private nuisance. It accordingly is made so. This rule has the further justification that the master, by the very fact of setting a servant upon work that may result in a nuisance, has brought about a state of things which he ought at his peril to prevent from actually producing that criminal result. Hence, instead of, as in ordinary offences, being liable only if he had authorised the servant's crime, he will, in the case of Nuisance, be liable even although he had actually forbidden it. For here he ought, at his peril, to have seen his prohibition obeyed.

But whilst the common law recognises only one instance of this extreme liability, several in recent times have been created by Parliament. Thus, for example, under the Licensing Act, 1910, a publican is held to be liable for the conduct of his servants if they supply refreshments to a constable on duty³; or again, if they knowingly permit any unlawful game,

¹ Thus see its exceptional position as to Pardon, *supra*, p. 15.

² *E.g.* the driver of my traction-engine blocks the street with it; 15 Cox 725. Cf. L. R., 1 Q. B. 702.

³ 10 Edw. VII. and 1 Geo. V. c. 24, s. 78. Yet not if the servants did not know him to be on duty; cf. p. 43, n. 2 *supra*.

or any "gaming," to be carried on upon the licensed premises¹. For, as Grove, J., said, "If this were not the rule, a publican would never be convicted. He would take care always to be out of the way." Again, going still further, a man has even been held responsible for adulteration effected by a mere stranger, whose acts he had no means of protecting himself against².

But it must be remembered that even in these exceptional offences, where one man's *mens rea* makes another become liable, a *mens rea* is still necessary³. Had the servant had no grounds for thinking that the constable was on duty, or that gaming was taking place, neither he nor his master would be punishable.

It is, as we have said, only in rare instances, that any less degree of *mens rea* than the ordinary one is allowed by law to suffice; and clear words are usually needed to establish that sufficiency. In construing any statutory definition of a criminal offence there is always a presumption against the sufficiency of any degree of *mens rea* that falls short of the ordinary one. The lesser the suggested degree of it, or the severer the punishment, or the older the statute, the greater will be the need of clear and unmistakable words to rebut this presumption and establish the sufficiency. Hence though the statute against Bigamy simply specifies the *actus reus*—"being married, marries"—and is silent as to requiring any *mens rea*, yet the great majority of the judges decided in

¹ *Ibid.* s. 79. *Redgate v. Haynes*, L. R. 1 Q. B. D. 89; *Bond v. Evans*, L. R. 21 Q. B. D. 249. "Gaming" consists in the playing for money or money's worth at any game, even though a lawful one.

² *Parker v. Alder*, L. R. [1899] 1 Q. B. 26. Contrast *Brooks v. Mason* (L. R. [1902] 2 K. B. 743), with *Emary v. Nolloth* (L. R. [1903] 2 K. B. 264); showing that the law holds a publican liable for selling liquor in an unsealed vessel to a child under fourteen, although he honestly believed (mistakenly) that it was sealed; yet the law does *not* go so far as to hold him liable for its being similarly sold by his barman who is authorised to sell (unless this barman has the general control of the inn). Either seller's reasonable though mistaken belief that the child is over fourteen *would* excuse him.

³ Hence say—with the Judicial Committee (L. R. [1897] A. C. 387)—that in them "a less *mens rea* is made sufficient," not that "there is no *mens rea*."

*Reg. v. Tolson*¹ that the absence of the ordinary *mens rea* will afford a good defence for remarrying, if it appears that the prisoner contracted the second marriage with an honest and reasonable belief that his first wife was dead. Similarly, in *Reg. v. Sleep*², under a statute which made it an offence simply "to be found in possession of Government stores marked with the broad arrow," and said nothing as to any necessity for guilty knowledge, it was held that the prisoner could not be convicted if the jury found that, though he had possession of such stores, and had reasonable means of knowing of the mark, he neither knew of it nor had wilfully abstained from knowing of it. But in Acts of Parliament that are very recent the courts are less reluctant to dispense with the necessity for the ordinary degree of *mens rea*. For, owing to the greater precision of modern statutes, it is permissible to draw a more emphatic inference from their silence than would be drawn in the case of an older enactment. Hence if the public evil of an offence created by some recent statute be very great, when compared with the smallness of its punishment, then even a mere silence as to guilty knowledge may be sufficient to show that the legislature did not intend ordinary guilty knowledge to be essential to the offence³.

In determining whether an Act does create this more stringent prohibition, regard must be paid to "the object of the statute, the words used, the nature of the duty, the person upon whom it is imposed, the person by whom it would in ordinary cases be performed, and the person upon whom the penalty is imposed⁴."

¹ L. R. 23 Q. B. D. 168 (K. S. C. 15). *Infra*, pp. 308-9.

² L. and C. 44. Contrast *Reg. v. Woodrow*, 15 M. and W. 404.

³ Per Stephen, J., in *Reg. v. Tolson*, L. R. 23 Q. B. D. 168 (K. S. C. 15). In contrast with Tolson's case, *Rex v. Wheat* (L. R. [1921] 2 K. B. 119) shews the increasing readiness to give this full effect to mere silence in a penal statute. See p. 309 *infra*.

⁴ *Mousell Brothers Limited v. L.N.W. Ry. Co.*, L. R. [1917] 2 K. B. at p. 845.

CHAPTER IV

EXEMPTIONS FROM RESPONSIBILITY

WE have seen that *mens rea*, in some shape or other, is a necessary element in every criminal offence. If this element be absent, the commission of an *actus reus* produces no criminal responsibility; any more than when a blow is inflicted by the involuntary jerkings of the limbs of a sufferer from St Vitus's Dance.

Blackstone's classification of the various conditions which in point of law negative the presence of a guilty mind¹, has become so familiar that it is convenient to adhere to it, in spite of the defects of its psychology. Three of his groups of cases of exemption deserve minute consideration. These are:

I. Where there is no will.

II. Where the will is not directed to the deed.

III. Where the will is overborne by compulsion.

I. *Where there is no will.* (Students of Austin's *Jurisprudence* should be warned that Blackstone's "Will" is not Austin's "Will," i.e. a volition, and indeed is not clearly definable at all; but it corresponds roughly with Austin's "Intention².") This absence of will may be due to any one of various causes.

(1) *Infancy.*

The most common cause, one which must place every member of the community beyond the control of the criminal law for some part of his life, is Infancy. By the law of Crime, infants are divided into three classes:

i. Those under seven years of age. There is a conclusive presumption that children so young cannot have *mens rea* at

¹ 4 Bl. Comm. 21.

² Austin, Lect. XIX.; Clark's *Analysis of Criminal Liability*, p. 74.

all¹. Nothing, therefore, that they do can make them liable to be punished by a criminal court; so a child of six, who was arrested for crime, obtained damages from the arrestor². But it is not illegal for parents to administer domestic punishment to such children, if they have in fact become old enough to understand it³.

ii. Between seven and fourteen⁴. Even at this age "infants" are still presumed to be incapable of *mens rea*; but the presumption is no longer conclusive, it may be rebutted by evidence. Yet the mere commission of a criminal act is not, as it would be in the case of an adult, sufficient *prima facie* proof of a guilty mind. The presumption of innocence is so strong in the case of a child under fourteen that some clearer proof of the mental condition is necessary. This necessity for special proof of *mens rea* is impressed upon the jury who try such an infant, by their being asked not only the ordinary question, "Did he do it?" but also the additional one, "Had he a guilty knowledge that he was doing wrong?"

This guilty knowledge may be shewn by the fact of the offender's having been previously convicted of some earlier crime; or even by the circumstances of the present offence itself, for they may afford distinct proof of a wicked mind. Thus a boy of eight was hanged in 1629 for burning two barns; "it appearing that he had malice, revenge, craft and cunning⁵." Two boys, aged eight and nine respectively, were

¹ By an uncomplimentary parallel, Prisot, C. J., pronounced them to be "in the same case as an ox or a dog that does harm to a man"; Statham, *tit. Trespass*, pl. 93.

² *Marsh v. Loader*, 14 C. B., N.S. 535.

³ *Reg. v. Griffin*, 11 Cox 402.

⁴ Modern statutory phrases (see the Children Act, 1908, s. 131) are: up to fourteen, a "child"; from fourteen up to sixteen, a "young person"; from sixteen to twenty-one, a "juvenile adult." "Juvenile Courts" (*infra*, ch. xxviii.) are for persons under sixteen. Yet in the Education Act, 1921, s. 170, "child" has a slightly different meaning.

⁵ 1 Hale P. C. 25. Michael Hamond and his sister, aged seven and eleven, were hanged at Lynn for felony, in 1708; Richard's *King's Lynn*, p. 888. A boy of twelve and a half was hanged in New Jersey in 1828; 18 American Decisions 404.

tried at Liverpool, in 1891, for murder, in having drowned another boy, in order to steal his clothes; but they were acquitted on the ground of their infancy.

iii. Between fourteen and twenty-one. A boy knows right from wrong long before he knows how to make a prudent speculation or a wise will. Hence at fourteen an infant comes under full criminal responsibility. (A trifling exception perhaps exists in the case of some ethically innocent offences of omission, which may be merely due to lack of wealth; 3 Ad. and E. 597.)

But, by the Children Act, 1908 (8 Edw. VII. c. 67, s. 103) no infant under *sixteen* can be sentenced to death, or to penal servitude, or (unless he be "unruly") to imprisonment. And no infant under *fourteen* can be sentenced to imprisonment. In all these cases the forbidden punishment is replaced by mere "Detention"; and even it, in most crimes, can only be for a month. Cf. ch. xxxi, *infra*.

(2) *Insanity*¹.

Absence of "Will" may also arise, not from the natural and inevitable immaturity which we just now discussed, but from a morbid condition of mind; whether the temporary delirium of fever or a permanent Insanity.

English law, even in its harshest days², recognised insanity as a possible defence. On the other hand, it has never held (as a popular error imagines it to hold³) that the mere existence of any insanity whatever will suffice to exempt the insane person from criminal responsibility⁴. Only insanity of

¹ Stephen, *Hist. Cr. Law*, II. 124-186; *General View of Criminal Law*, 1st ed. 86-96.

² Cf. *Kentish Eyre of 1313* (Selden Society), I. 81; "demens et furiosus, non per feloniam."

³ But so to hold "would turn the administrators of the criminal law adrift, without a compass, upon a shoreless and starless sea" (Lord Hewart, L.C.J.).

⁴ Thus a man who had an insane delusion that his wife had committed adultery with A and B and C was nevertheless sentenced to death for killing Z; *The Times*, Oct. 29, 1909.

a particular and appropriate kind will produce exemption¹. For lunatics are usually capable of being influenced by ordinary motives, such as the prospect of punishment²; hence they usually plan their crimes with care, and take means to avoid detection.

Careful observation of insane patients, in various countries throughout many years, has now thrown light upon the mental processes of the insane. The world, it is now recognised, is full of "warped" men and women; in whom there exists some taint of insanity, but who nevertheless are readily influenced by the ordinary hopes and fears that control the conduct of ordinary people. To place such persons beyond the reach of all fear of criminal punishment would not only violate the logical consistency of our theory of crime, but would also be a cause of actual danger to the lives and property of all their neighbours. Where insanity takes any such form, it comes clearly within the rule of criminal legislation propounded by Bain³: "If it is expedient to place restrictions upon the conduct of sentient beings, and if the threatening of pain operates to arrest such conduct, the case for punishment is made out."

Hence our criminal⁴ law divides insane persons into two classes:

(a) Those over whom the threats and prohibition of the criminal law would exercise no control, and on whom therefore it would be gratuitous cruelty to inflict its punishments; and

(b) Those whose form of insanity is only such that—to use

¹ Similarly in civil matters, the Will of a man who carried on his business intelligently has been held valid although he was so insane as to believe that his "trees were full of crocodiles, and their leaves were birds." Cf. L. R. 14 Ch. D. 674.

² "Lunatic prisoners, when guilty of assaulting a prison warder, will sometimes say 'You can't touch me; I am a lunatic.'" (Dr John Campbell's *Thirty Years' Experiences of a Medical Officer*, p. 92.)

³ *Mental and Moral Science*, p. 404.

⁴ But English law as a whole is complex with regard to Insanity. "As to crimes, contracts, wills, detention in asylums, and other matters, about eight different tests are applied by it"; (McCardie, J.).

Lord Bramwell's apt test—"they would not have yielded to their insanity if a policeman had been at their elbow."

But the very difficult question as to where the line of demarcation should be drawn between the two classes, is one upon which the law has undergone grave though gradual changes and cannot be said to have developed even now into a complete or even a perfectly stable form. Two centuries ago a view prevailed that no lunatic ought to escape punishment unless he were so totally deprived of understanding and memory as to be as ignorant of what he was doing as a wild beast. But ever since the epoch-making speech of Erskine in defence of Hadfield¹ a more rational view has prevailed; which bases the test upon the presence or absence of the faculty of distinguishing right from wrong in the crime committed.

This modern view has acquired a degree of authoritative precision unusual for any common law doctrine; through its formulation in an abstract shape, in 1843, by a set of answers delivered by the judges in reply to questions propounded to them by the House of Lords. One Daniel McNaughton² had aroused public excitement by the murder of a Mr Drummond, the private secretary of Sir Robert Peel, in mistake for that statesman. The acquittal of McNaughton on the ground of insanity provoked such widespread dissatisfaction that it became the subject of debate in the House of Lords (though the case never came before that House in its judicial capacity). In consequence of the debate, the Lords submitted to the judges certain abstract questions respecting persons afflicted with insane delusions³. The replies given by the judges may be summed up thus:

(i) Every man is presumed⁴ to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of a jury.

(ii) To establish a defence on the ground of insanity, it

¹ 27 St. Tr. 1281; A.D. 1800.

² The name is spelt variously.

³ *Reg. v. McNaughton*, 10 Cl. and F. 200; (K. S. C. 43).

⁴ Cf. ch. xxiv. *infra*.

must be "clearly" shewn that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality¹ of the act he was doing, or (if he did know this) not to know² that what he was doing was wrong³ morally.

(iii) As to his knowledge of the wrongfulness of the act, the judges say: "If the accused was conscious that *the act* was one which he ought not⁴ to do and if that act was at the same time contrary to the law of the land, he is punishable." Thus the test is the power of distinguishing between right and wrong, not, as was once supposed, in the abstract, but in regard to the particular act committed.

(iv) Where a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he will be under the same degree of responsibility as if the facts had been as he imagined them to be. He may, for instance, kill under the imagination either that he is an executioner law-

¹ These two words are mere synonyms (though medical witnesses have often treated their meanings as dissimilar). They refer to the "*physical* nature of the act, as distinguished from moral"; 12 Cr. App. R. 27. *E.g.* the madman cut a woman's throat under the idea that he was cutting a loaf of bread.

² Stephen thinks that inability to "calmly and rationally" *consider its wrongness* suffices to disprove this knowledge.

³ *E.g.* he fancied, like Hadfield, that he had received a Divine command to kill.

⁴ As to the meaning to be given here to "ought not," it was decided in *Rex v. Codere* (12 Cr. App. R. at p. 27) that the meaning is—wrong "according to the ordinary standard adopted by reasonable men." And if he knew (not in mere presumption of law, but actually) that the act was wrong legally, he must—at any rate in serious crimes, though perhaps not always in "minor cases before a court of summary jurisdiction"—be taken to have known that it was wrong by this ordinary moral standard. In *Rex v. Pank* (C. C. C., May 21, 1919), the insane prisoner was under the double delusion (1) that his sister-in-law wished to commit adultery, and (2) that it was consequently his duty to kill her in retribution. Darling, J., directed the jury thus: "He knew the nature and quality of his act; for he knew that he was shooting, and that this shooting would kill her. Did he know that it was 'wrong'? If he knew that his act would be wrong in ordinary circumstances, it is no defence that he thought that the special circumstances, present in this particular case, would render it justifiable in him to do that act." He was convicted and sentenced.

fully carrying out a judicial sentence; or, on the other hand, merely that the person killed had once cheated him at cards.

Let us add that, for a defence of insane delusion, the act must be connected with the delusion directly. An instance of such connexion (though due not to insanity but to sleep), may be cited from Scotland where a man, dreaming that he was struggling with a wild beast, killed his baby¹. On the other hand, a man has been convicted of obtaining money by false pretences notwithstanding his insanity, when his delusion was only that he was the lawful son of a well-known prince.

The questions put to the judges had reference, as we have seen, only to the effect of insane delusions and insane ignorance. But insanity affects not only men's beliefs, but also (and indeed more frequently) their emotions and their wills. Hence since 1843 much discussion has taken place as to the effect of these latter forms of insanity in conferring immunity from criminal responsibility. The result has been that though the doctrines laid down after *McNaughton's* trial remain theoretically unaltered², the practical administration of them affords a wider immunity than their language would at first sight seem to recognise. For many forms of insanity, which do not in themselves constitute those particular defects of reason which the judges recognised as conferring exemption from responsibility, are now habitually treated as being sufficient evidence to shew that one or other of those exemptive defects was also actually present. A man who, after killing his child, goes forthwith to the police station to surrender himself, and gives a lucid account of what he has done, would certainly seem to know the nature and quality of the act committed, and to know that in doing it he did wrong. Yet if he had previously shewn some symptoms of madness, and has killed this child with no discoverable motive and no attempt at concealment, a judge would probably encourage a jury to regard these facts as evidence of his labouring under

¹ *Fraser's Case*, 4 Couper 70; A.D. 1878. He was discharged.

² Cf. 14 Cr. App. R. at p. 54; 15 Cr. App. R. at p. 12.

such insanity as would render him irresponsible¹. The mere fact that a crime has been committed without any apparent motive is, of course, not sufficient of itself to establish any similar immunity².

How far an insane Impulse to do an act is to be regarded—not merely as thus being evidence of an exculpatory insanity, but—as *in itself* affecting criminal responsibility, is a question not yet definitely settled. In the United States both the Supreme Court and the courts of some of the States recognise irresistible impulse as being a sufficient defence; even when accompanied by a knowledge that the act was wrong. In England the authority of Sir James Stephen³ and the dicta of some judges⁴ similarly support the view that an insane impulse should be admitted as a defence if really irresistible (not merely unresisted)⁵, because then the act done would not be a “voluntary” act at all. Stephen adds a qualification—“unless this absence of the power of control has been produced by his own default.” But on the other hand, many of our judges have held that an insane impulse, even when uncontrollable, constitutes no defence⁶.

There is one form of insane impulse, that of kleptomania,

¹ Cf. the case (*Times*, July 29, 1901) of Hannah Cox, a devoted mother, who, under pressure of poverty, drowned two of her infants, “as it was the best thing she could do for them.” Though she had shewn no other symptoms of insanity, either before or after this act, Bigham, J., advised the jury to declare her irresponsibly insane.

² *Reg. v. Haynes*, 1 F. and F. 666 (K. S. C. 52).

³ *Dig. Cr. Law*, Art. 38; *Hist. Cr. Law*, II. 167.

⁴ *Rex v. Hay*, 22 Cox 268, is no sound authority; since Hay, independently of any Impulse, “did not know the quality” of his act; see C. C. C. Sess. Pap. CLV. 338. But *Rex v. Fryer* (24 Cox 403) and *Rex v. Jolly*, 83 J. P. 296, are stronger.

⁵ A remarkable instance of continued and successful resistance to an insane impulse is cited by Stephen, *Hist. Cr. Law*, II. 172.

⁶ *Reg. v. Burton* (K. S. C. 50). Cf. 15 Cr. App. R. 10, 163. See Russell on Crimes, p. 78, that “the tendency is in favour” of this view. Cf. Stroud’s *Mens Rea*, p. 201. Ten out of twelve judges, consulted in 1924 as to the propriety of legislation—which Lord Justice Atkin’s Committee had recommended in 1923—for recognising the defence of Irresistible Impulse, advised against its recognition; (*The Times*, May 16, 1924). The C. C. A., in *Rex v. Kopsch* (19 Cr. App. R. 50; cf. 142), repudiated this defence.

which is sometimes put forward, with or without evidence, by well-to-do persons accused of trivial acts of theft. It naturally is chiefly in courts of Petty Sessions that these unimportant charges are preferred; and in such courts a plea of insanity is the safer to raise because they do not possess the power, enjoyed by higher tribunals, of ordering an accused person, who establishes this plea, "to be kept in custody as a criminal lunatic¹." That an impulse to steal does sometimes arise from actual insanity seems to be established by the fact that it is often limited to special times (*e.g.* that of pregnancy) or to some special class of objects (*e.g.* hats, boots, tablecloths) which are accumulated in numbers not at all needed by the thief.

The defence of insane Impulse is now rarer than that of Unconscious Automatism², as in epilepsy or sleep-walking. But our courts, unlike Continental tribunals, have not yet become familiar with the plea that a crime was committed under the influence of post-hypnotic "suggestion," exercised by some designing person who had induced hypnotic sleep in the offender. It remains to be seen what exemptive effect will ever be accorded in England to such "suggestions," or to those affections which (like hysteromania and neurasthenia) have been called the borderland of insanity. Such questions have become of great practical importance, now that modern science has come to recognise so clearly, in addition to the ordinary "Intellectual" insanity which impairs a man's Judgment, a "Conative" form which affects his Will, whether by weakening his natural impulses to action or by inspiring abnormal impulses, and an "Affective" insanity which disturbs his Emotions of love or hatred³.

¹ Trial of Lunatics Act, 1883 (46 and 47 Vict. c. 38, s. 2).

² Which is covered by the McNaughton rules; 14 Cr. App. R. at p. 55.

³ The temporary disturbance of a sane mind by intense grief was considered in *Rex v. Beadon*, where a sane woman was indicted for poisoning her child at a time when she was sane, but was distressed by the death of her husband. Shearman, J., told the jury that, if they thought she was "so distraught that she did not know it was a dangerous thing to administer poison" they might find her guilty of only a manslaughter. But he admitted his ruling to be "an innovation" (*Daily Telegraph*, Sept. 12, 1924).

Moreover there are many persons who, whilst not so insane as to be exempt from criminal responsibility, or perhaps even to require restraint, are nevertheless mentally abnormal. The Commissioners of 1908 classified all the mentally afflicted (eight per thousand of the nation, but nineteen per cent. of the persons arrested by the police) pathologically thus:

I. Those who once were normal, but have become abnormal; whether (a) through disorder of mind, *i.e.* "lunatics"; or (b) through decay of mind (*e.g.* in senility), *i.e.* "the mentally infirm."

II. Those who never had full mental power; viz. (1) Idiots, (2) the Imbecile, (3) the Feeble-minded, (4) the Moral Imbeciles.

This latter group (II. 1-4) are usually too incapable of self-control to be deterred effectually by the prospect of Punishment. Hence the Mental Deficiency Act, 1913 (8 and 4 Geo. 5, c. 28, s. 8), provides for cases in which a crime, so grave as to be punishable (in an adult) with penal servitude or imprisonment, has been committed by any one who *from before the age of eighteen*¹ has belonged to this group. The court which convicts him may, instead of passing a sentence, place him under guardianship or send him to an Institution for mental defectives. In 1926, 52 were so sent by the courts.

No similar provision has as yet been made for similar abnormality that has arisen in later life. Such cases are perhaps fitter for consideration by the Home Office than in the swiftness of a forensic trial. But in the United States and France and Scotland degrees of mental affliction that are too slight to confer complete exemption from responsibility are recognised as a circumstance that may mitigate the offender's punishment². This view is defended on the ground that every form of insanity weakens the power of self-control, so that the offender's moral guilt is proportionately lessened, and therefore, on the Retributive theory, his punishment ought to be the less. (Yet, on the Deterrent theory of punishment,

¹ 17 and 18 Geo. 5, c. 33 modifies to this the original vague limit. Cf. p. 538 *infra*.

² Cf. *infanticide*, p. 125 *infra*.

this argument might occasionally be employed for the opposite purpose of aggravating the punishment; for the weaker a man's will, the more sternly does it need to be braced by the fear of penalty.) In English practice the lessened capacity of self-control is often treated as a mitigating circumstance; for instance, when sunstroke or sleepy sickness has left a man with a will-power permanently so weakened that he pursues any passing pleasure with little regard for consequences. Strict logic, however, suggests that a non-exemptive insanity instead of merely lessening the punishment should modify it, by giving it a curative form.

In cases where a defence of insanity has been accepted¹ by a jury², the form of their verdict used to be "not guilty, on the ground of insanity." But now, under the Trial of Lunatics Act, 1883 (46 and 47 Vict. c. 38), it is to be "guilty of the act (or omission), but so insane as not to be responsible, according to law, for his actions at the time when the act was done (or the omission made)³."

The Court then orders the prisoner to be kept in custody as a "criminal lunatic⁴," till His Majesty's pleasure shall be known; and His Majesty may order him to be kept in custody, during his pleasure, in such place and manner as he may think fit. The confinement is usually lifelong⁵; and consequently

¹ English law (*supra*, p. 53) presumes an accused person to be sane. Hence the prisoner must give "clear" proof (10 Cl. and F. at p. 210) of Insanity. But any seeming harshness in this rule is obviated in the present practice, under which the Crown hands to the Judge and to the accused all its information as to the latter's state of mind, *e.g.* the prison-surgeon's report. Prisoners' counsel sometimes prefer *not* to raise the defence of Insanity. So also may an undefended prisoner: hence, if a prisoner has no counsel, the crown counsel will expressly ask whether the Judge thinks it desirable for him to call the medical witnesses.

² Justices of the Peace can accept the defence when trying an offender *summarily*; but not when examining for commitment to a higher court.

³ This 1883 form was devised by Queen Victoria; to emphasise, somewhat illogically, that "guilt" which the law denies. Her life had several times been imperilled by insane assailants.

⁴ There are usually nearly a thousand criminal lunatics under detention.

⁵ Apart from female prisoners whose insanity was merely a puerperal mania, only about one prisoner in 150 obtains release from Broadmoor. The annual cost of this asylum is about £92,000.

the defence of insanity is rarely set up in the higher criminal courts except in heinous crimes¹.

It may be added that insanity is sometimes important in criminal law, even apart from its bearing on *mens rea*. For if a man become insane² after committing a crime, he cannot be tried until his recovery, any more than can a foreigner, or deaf mute, for whom no interpreter is available. Again, if after conviction a prisoner become insane², he cannot be hanged until his recovery, for he may have some plea which, if sane, he could urge in stay of execution³.

(3) *Intoxication.*

This, whether produced by alcohol or by drugs, is ordinarily no excuse for the commission of a criminal act; even though it have produced for the time great aberration of mind. For, unlike insanity, it has been produced voluntarily; and to produce it was wrong, both morally and also legally⁴. Accordingly the law will not allow one wrong act to be an excuse for another⁵. Hence the gross negligence⁶ which has caused

¹ During twenty-two recent years the defence was raised with success in thirty-three per cent. of the trials for murder; but in less than two per cent. of other criminal trials. An unusually minute picture of the practical working of a trial where this defence is raised may be seen in *The Times* of April 20, 1882.

² In any form of certifiable insanity, even though not such as the McNaughton rules would cover. See p. 539 *infra*.

³ Less than thirty of the prisoners for trial in any year are found to be so insane as to be incapable of trial, whilst less than forty of those tried are acquitted on the ground of insanity. A person so acquitted cannot appeal to the Court of Criminal Appeal against either half of the verdict; *Felstead's Case*, L. R. [1914] A. C. 534.

⁴ Until 1872 it was a criminal offence, under 4 Jac. I. c. 5, s. 2; and even now a conspiracy to produce it would be indictable, and a contract for it would be void.

⁵ But actual Insanity, even when produced by drunken habits (as in some cases of *delirium tremens*), exempts from criminal responsibility just as effectually as if it had not originated in misconduct. And intoxication itself, in those rare cases where it is innocent—as when produced by necessary medical treatment or by the fraud of malicious companions—has the full exemptive effect of insanity. This exemption has been extended in Ireland and the United States even to the case of a person who, in consequence of fatigue or sleeplessness, becomes intoxicated by taking the small quantity of alcohol which usually he takes with impunity (*Reg v. Mary R.*, see Kerr on Inebriety, ch. xxii).

⁶ Cf. 16 Cox, at p. 309 (surgeon's negligence).

a fatal collision is punishable, not only in a sober driver but also in a drunken one. And if a man, when excited by liquor, stabs the old friend whom he never quarrelled with when sober, or steals the picture which never attracted him before, it is no defence to say that "it was the drink that did it." Indeed the older law (4 Coke 125 *a*) regarded intoxication as even aggravating¹ the guilt of any crimes whose predisposing cause it was. But modern judges, whilst still holding that it cannot excuse that guilt, admit that it may mitigate the punishment².

Moreover, though drunkenness is thus no excuse for a guilty state of mind, it often affords a defence for an *actus reus* by being evidence that no guilty state of mind existed. For intoxication may cause—even on grounds slighter than could reasonably lead a sober person to the same erroneous conclusion—a Mistake³ of fact, such as is incompatible⁴ with *mens rea*. The drunken man fancies some one else's umbrella to be his own; or supposes an innocent gesture to be an assault, and hits back in supposed self-defence⁵.

An authoritative declaration of the law as to intoxication was given in 1920 by the concurrence of eight law lords in *Beard's Case* (L. R. [1920] A. C. 479). This judgment settles (1) that, as we have already seen, "merely to establish that the man's mind was so affected by drink that he more readily gave way to some violent passion" forms no excuse. But (2) "if actual Insanity in fact supervenes, [even] as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as Insanity induced by any other cause... Insanity, even though temporary, is an answer." Yet (3) in cases of mere intoxication the test for exemption is more

¹ Though not on the principle of Lord Cockburn's convivial Scottish judge who argued, "If he remains so bad even when drunk what must he be when sober?"

² 1 Cr. App. R. 181, 255; 25 T. L. R. 76.

³ At a baby's christening party, its nurse, having got so drunk as to be "quite stupid and senseless," put the infant on the fire by mistake for a log of wood. The magistrates discharged her. (*Gent. Mag.* 1748, p. 570.)

⁴ *Infra*, p. 66.

⁵ *Reg. v. Gamlen*, 1 F. and F. 90 (K. S. C. 54). Cf. 31 T. L. R. 361; and 12 Cr. App. R. 221.

stringent than in case of Insanity; a judge should not ask the jury "the question 'whether the prisoner knew that he was doing wrong,' in a defence of drunkenness where Insanity is not pleaded." Still (4) evidence of such a drunkenness as "renders the accused incapable of forming the specific intent, essential to constitute the crime, should be taken into consideration, with the other facts proved, in order to determine whether or not he had this intent." In such a case the drunkenness, if incompatible with the indispensable mental element of the crime, "negatives the commission of that crime." Thus a drunken man's inability to form an intention to kill, or to do grievous bodily harm¹ at the time of committing a homicide, may reduce his offence from murder² to manslaughter (which latter crime requires no specific intent). The judgment adds that this principle is not "an exceptional rule applicable only to cases in which it is necessary to prove a specific intent;...for, speaking generally, a person cannot be convicted of crime unless the *mens was rea*." A man's drunkenness may preclude him, not merely from forming one of these specific intentions, but from forming any intent at all.

It was held by the Court of Criminal Appeal in *Rex v. Meade* (L.R. [1909] 1 K. B. 895) that if a man were so drunk as to be "incapable of knowing that what he was doing was dangerous, *i.e.* likely to inflict serious injury," this would rebut the presumption that he *intended* the natural consequences of his act³. So a fatal attack with a razor might thus be reduced from murder to at most a manslaughter. Similarly in *Rex v. Griffiths* the same Court (Nov. 17, 1913) unanimously approved a ruling that to be in "such a state of drunkenness that he could not appreciate that his act would cause grievous bodily harm," would be a defence.

¹ As in *H.M. Advocate v. Campbell* (Scotch Justiciary Cases, 1921, p. 12).

² *Reg. v. Monkhouse*, 4 Cox 55.

³ The general doctrine of *Rex v. Meade* seems to be recognised by *Rex v. Beard*; though the latter case engrafts upon the former one an exception, *viz.* where the crime is one of "Constructive Murder" in attempting some other felony (see pp. 138-140 *infra*). Cf. also p. 539 *infra*.

Drunkenness thus may show that an apparent burglar had no intention of stealing¹; or that an apparent suicide jumped into the water when "so drunk as not to know what he was about²." The more complex the intent required by the definition of the particular crime, the more likely is drunkenness to be useful in disproving the presence of some element requisite to it; as by shewing that wounds were inflicted with no "intent to do grievous bodily harm³," or that a false pretence was made with no "intent to defraud."

Let us finally note that the question "Was he drunk?" is often⁴ answered too definitely, as if there existed some single standard of sobriety. Intoxication, it should always be remembered, is a question of degree, ranging from mere exhilaration down to unconsciousness⁵. The man may be too drunk to do this act properly, yet sober enough to do some other. Our earliest legal standard of sobriety was overlenient; regarding a man as not intoxicated unless "the same legs which carry him into the house cannot bring him out again," (Dalton's *Country Justice*, p. 27, A.D. 1635)⁶.

(4) Corporations.

Corporations formerly lay quite outside the criminal law. If a crime were committed by a corporation's orders, criminal proceedings, for having thus instigated the offence, could only be taken against the separate members, in their personal

¹ *The State v. Bell*, 29 Stiles 316 (K. S. C. 55).

² *Reg. v. Moore*, 3 C. and K. 319.

³ *Rex v. Meakin*, 7 C. and P. 297 (K. S. C. 54).

⁴ Especially often when it is (not the Excuse but) part of the Crime. It is such, for instance, in the various petty offences of being drunk (1) "in a public place," (2) "on licensed premises," (3) "and incapable," (4) "and disorderly," (5) "in charge of a carriage" (e.g. a motor-car), (6) "in charge of loaded firearms," (7) "in charge of a child under seven."

⁵ Hence the familiar division into four successive stages—jocose, bellicose, lachrymose, comatose.

⁶ We may add that an accused man may sometimes be helped towards acquittal by the fact of his having been drunk even on some occasion *subsequent* to the date of the crime in question. For it may afford an innocent explanation of conduct that otherwise would suggest a consciousness of guilt; as where, on being arrested, he has made untrue statements or has refused to make any statement at all.

capacities, and not against the corporation as itself a guilty person¹. This was a consequence of the technical rule that criminal courts expected prisoners to stand at their bar, and did not permit "appearance by attorney²." But it was further supported also by more scientific considerations, which the Roman law had anticipated and accepted³. It was urged that a corporation, as it had no actual existence, could have no will; and therefore could have no guilty will⁴. And it was further urged that, even if the legal fiction which gives to a corporation an imaginary existence may be stretched so far as to give it also an imaginary will, yet the only activities that could consistently be ascribed to the fictitious will thus created, must be such as are connected with the purposes which it was created to accomplish. If so, it could not compass a crime; for any crime would be necessarily *ultra vires*. Moreover a corporation is devoid not only of mind, but also of body; and therefore incapable of the usual criminal punishments. "Can you hang its common seal?" asked an advocate in James II's days (8 St. Tr. 1138).

But under the commercial development which the last two generations have witnessed, corporations have become so numerous that there would have been grave public danger in continuing to permit them to enjoy this immunity. The various theoretical difficulties have therefore been brushed aside; and it is now settled law that corporations may, in an appropriate court, be indicted by the corporate name, and

¹ Cf. Pollock and Maitland, I. 473, 661.

² But the King's Bench allowed corporations indicted before itself to appear by attorney; hence they became able so to appear at Assizes (28 T. L. R. 197). The Criminal Justice Act 1925, s. 33 (3) will permit them so to appear even at Quarter Sessions. By s. 49 of the Summary Jurisdiction Act, 1879, corporations may now appear by attorney at Petty Sessions.

³ Yet the theory of Germanic law inclined the other way; as our English institution of Frankpledge (Stubbs' *Const. Hist.* I. 618) may serve to remind us. Cf. Maitland's *Political Theories*, p. xxxix.

⁴ Hence, even in civil actions, doubts were long entertained as to the possibility of holding a corporation liable for those Torts in which "express malice" is necessary. Contrast *Abrath v. N.E. Ry. Co.* (L. R. 11 A. C. 247) with *Chuter v. Freeth* (27 T. L. R. 467).

that fines may be consequently inflicted upon the corporate property. The innovation was introduced at first by drawing a distinction between offences of non-feasance and those of mis-feasance; on the ground that whilst, in the case of a criminal mis-feasance, the servant or agent who actually did the criminal act could always be himself indicted, no such indictment would be available in the case of a non-feasance; for the omission would not be imputable to any individual agent but solely to the corporation itself. Hence, in 1840, an indictment for non-feasance, in omitting to repair a highway, was allowed against a corporation, in *Reg. v. Birmingham and Gloucester Ry. Co.*¹ Soon afterwards, in the case of *Reg. v. The Great North of England Ry. Co.*², an indictment was similarly allowed even for a mis-feasance, that of actually obstructing a highway. And the principle has received legislative approval. For the Interpretation Act, 1889³, provides that in the construction of every statutory enactment relating to an offence, whether punishable on indictment or on summary conviction, the expression "person" shall, *unless a contrary intention appears*, include a body corporate. The gravity, or the nature, of an offence may be sufficient to shew that the framers of the enactment against it could not have had any intention of regarding bodies corporate as capable of committing it.

Thus the fact that a corporation cannot be hanged or imprisoned⁴ sets a limit to the range of its criminal liability. A corporation can only be prosecuted, as such, for offences which can be punished by a fine⁵. Thus, whilst it can be indicted and fined for a libel published by its order, it cannot

¹ 3 A. and E. (N. S.) 223.

² 9 A. and E. (N. S.) 315 (K. S. C. 69).

³ 52 and 53 Vict. c. 63, s. 2. *Pearks v. Ward*, L. R. [1902] 2 K. B. 1.

⁴ Or "committed" for trial (16 Cr. App. R. 131); so the Criminal Justice Act, 1925, s. 33 (1), substitutes from June 1, 1926, an order empowering the prosecutor to present a bill to the grand jury.

⁵ And though manslaughter is finable, a corporation cannot be indicted for it, nor for any other crime that involves personal violence (*e.g.* assault or riot) or that is a felony. See *Rex v. Cory*; L. R. [1927] 1 K. B. 810.

be indicted for a burglary, or any other offence which is too grave to admit of being visited by a merely pecuniary penalty. If any crime so heinous be committed by the orders of a corporation, the various persons by whom it was ordered must be indicted individually in their own names, and punished in their own persons. It must be remembered that they are also liable to be thus individually indicted, even in the case of those less heinous offences for which their corporation might itself be indicted; for *it* becomes indictable only through the fact that a wrong has been instigated by *them*.

II. *Where the will is not directed to the deed.*

This state of mind arises from mistake or some other form of ignorance (*e.g.* taking from the hat-stand in your club another man's umbrella in mistake for your own).

Our criminal law often allows it to afford a good defence; as shewing, even though there has been an *actus reus*, that no sufficient *mens rea* preceded it¹. But such a defence can only arise when three conditions are fulfilled.

(1) The first condition is that the mistake must be of such a character that, had the supposed circumstances been real, they would have prevented any guilt² from attaching to the person in doing what he did. Therefore it is no defence for a burglar, who breaks into No. 5, to shew that he mistook that house for No. 6; or did not know that nine o'clock (see p. 176) had struck. Similarly, on an indictment for assaulting a constable "in the discharge of his duty," the fact that the assailants did not know of his official character will not excuse them. On the other hand, it will be no offence³ to lay violent hands upon a person, whom you reasonably, though mistakenly, suppose to be committing a burglary⁴. The cases of

¹ Yet, in civil law, ignorance that a girl is a Ward of Court is no defence for the contempt of court committed by marrying her; L. R. [1909] 2 Ch. 260.

² As to whether this means legal guilt or moral guilt, see p. 42 *supra*.

³ As to the killing of a supposed dead man by one who imagines himself to have *already* murdered him, see three Indian cases where it was held not to be murder; L. Q. R. xxxvi. 7.

⁴ *Rex v. Levett*, Cro. Car. 538 (K. S. C. 26). Similarly where a friend, pre-

Reg. v. Prince and *Reg. v. Tolson*, which we have already discussed (*supra*, pp. 41, 48), afford important illustrations of this principle.

(2) A further condition is that the mistake must be a reasonable one. This will be mainly a question of fact; but the jury may be assisted by the judge's directions as to mistakes that are clearly reasonable or are clearly unreasonable. One of the former class is mentioned by Sir Michael Foster¹. A man, before going to church, fired off his gun, and left it empty. But during his absence some person went out shooting with the gun; and, on returning, left it loaded. The owner, late in the same day, took up the gun again; and in doing this, touched the trigger. The gun went off, and killed his wife, who was in the room. Foster held that the man had reasonable grounds to believe that the weapon was not loaded. The case might well have been otherwise if weeks, instead of hours, had elapsed between his firing off the gun and his subsequently handling it without taking any pains to see whether it had meanwhile been loaded again². Similarly in an American case³, where a constable was charged with arresting a man unlawfully, it appeared that the man had fallen down in the street in a fit⁴, and his friends had first tried to revive him by administering whiskey, and then had gone away to seek help. The constable was acquitted; for the fact that the man smelt of whiskey afforded reasonable ground for supposing his insensibility to be due to intoxication (a lawful ground for arrest)⁵.

tending to be a highwayman, played the part with a realism that proved fatal to himself (Taylor's *Medical Jurisp.* 10th ed. p. 760).

¹ Foster 265 (K. S. C. 27).

² Thus see *Reg. v. Jones*, 12 Cox 628 (K. S. C. 28) and *The State v. Hardie*, 10 Runnells 647 (K. S. C. 123); cases where a mistaken belief that the firearms were unloaded was *not* reasonable.

³ *Commonwealth v. Presby*, 14 Gray 65.

⁴ To distinguish epilepsy from intoxication is a difficult task; the police are often censured most unjustly for failing to achieve it.

⁵ If you shoot a house-pigeon, fancying it to be a wild one, the mistake will not excuse. The bird is not, (as a crow is), *obviously* wild; so you shoot at your risk. L. R. [1921] 2 K. B. 661.

But no belief which has now come to be currently regarded as an obsolete superstition can be treated as a mistake sufficiently reasonable to excuse a crime. Thus in 1880, at Clonmel, a woman who had placed a child naked on a hot shovel, in the honest belief that it was a deformed fairy sent as a substitute for the real child (who would be restored if the changeling were thus imperilled), was convicted and sentenced. So, in 1895, again at Clonmel, were men who had caused the death of the wife of one of them by holding her over a fire and searing her with a red hot poker, in the honest expectation of thereby exorcising a demon that was supposed to possess her¹. And even people who break the law in consequence of a belief that they are obeying a Divine command, are legally regarded as actuated by a mistake which is "unreasonable." Illustrations are afforded in America by the prosecutions of Mormons for polygamy²; and in England by the prosecutions of the "Peculiar People" for withholding medical aid from their sick children. At the same time it must be remembered that some religious delusions may be of so extreme a character as to be evidence of insanity, and to afford a good defence upon that ground³.

(3) The final condition is, that the mistake, however reasonable, must not relate to matters of law but to matters of "fact." For a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime⁴. *Ignorantia juris neminem excusat*⁵. The utmost effect it can

¹ In 1894 an Indian sentinel was convicted in Canada who had killed a man under the belief of his being an evil spirit that would attack human beings; *Reg. v. Machkequonabe*, 28 Ontario 309.

² *Reynolds v. United States*, 98 U. S. 145 (K. S. C. 31).

³ *Rex v. Hadfield*, 27 St. Tr. Compare C. C. Sess. Pap. CLIV. 357.

⁴ But I know of no reported decision which extends this rule to mere municipal bye-laws. Both in England and in the United States (*Porter v. Waring*, 69 N. Y. 250) a judge would require legal proof of a bye-law before enforcing it. Should the law attribute to ordinary people a greater legal knowledge than to the judge?

⁵ For a discussion of the justifications that may be offered for this severe rule, see Austin's *Jurisprudence*, Lect. xxv., and Markby's *Elements of Law*, secs. 269, 270. Perhaps after considering them all, the student may still

ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of *mens rea* which some particular kind of crime may require. Thus larceny can only be committed when a thing is stolen without even the appearance of right to take it; and, accordingly, a *bonâ fide* and reasonable mistake, even though it be of law—like that of a woman who gleans corn in a village where it is the practice to do so (*infra*, p. 205)—will afford a sufficient defence. Similarly a mortgagor who, under an invalid but *bonâ fide* claim of right, damages the fixtures in the house which he has mortgaged, will not be guilty of “malicious” damage¹. Apart, however, from such exceptional offences, the rule which ignores mistakes of law is applied with rigour. A sailor has been convicted of an offence that had been forbidden only by an Act of Parliament of which he could not possibly know, since it was enacted when he was far away at sea, and the offence was committed before the news of its enactment could reach him². Frenchmen, who had acted as seconds in a fatal duel here, have similarly been committed for trial on a charge of murder, although their own land practised duelling and they did not know that English law forbade it³. Italians have been punished in London for keeping lotteries, in spite of their urging that in Italy every little village possessed a lottery sanctioned by the State, and that they had no idea that the English law could be different. It is therefore easy to see that a veterinary surgeon’s mistaken belief that an operation, which he knows to be painful and purposeless⁴, is feel compelled, with the late Prof. Henry Sidgwick, to regard the rule as “not a realisation of ideal justice, but an exercise of Society’s right of self-preservation.” For the milder principles adopted in Roman law see Justinian’s *Digest*, xxii. 6, and Lindley’s *Jurisprudence*, p. 24 and App. xix.

¹ *Reg. v. Croft* [1889], C. C. C. Sess. Pap. cxi. 202.

² *Rex v. Bailey, R. and R.* 1 (K. S. C. 29). Cf. 86 J. P. 77.

³ *Barronet’s Case*, 1 E. and B. 1. French law forbids it, but not French opinion and custom.

⁴ In England dishorning adult cattle without an anaesthetic was illegal (*Ford v. Wiley*, L. R. 23 Q. B. D. 203) when still legal in Scotland and Ireland; see now 9 and 10 Geo. V. c. 54. It is an embarrassing but unsettled question whether the Jewish mode of slaughtering cattle is illegal in England. A bye-law favouring it was issued by the Ministry of Health in 1922.

nevertheless unpunishable legally, will afford him no defence for performing it.

These mistakes are reasonable enough; yet they afford no excuse. Nor would they do so, even if the prisoner could shew that he had taken pains to obtain a lawyer's advice and had been misled by it. Still less, therefore, can any excuse be conferred by legal errors that are unreasonable. Such are apt to occur in connexion with the crime of Bigamy. In a trial for it, which I witnessed at the Central Criminal Court in 1883, not only the prisoner himself, but also his first wife and all her family, had believed his marriage with her to be void, because the wedding-ring was only of brass and not of gold¹.

But although mistakes of law, unreasonable or even reasonable, thus leave the offender punishable for the crime which he has blundered into, they may² of course afford good grounds for inflicting on him a milder punishment³.

III. *Where the will is overborne by compulsion.*

(1) *Public civil subsection.* This rarely affords any defence in English law. Though the King can do no wrong, either civilly or even criminally—or, rather, *because* the King can do no wrong—his subordinates must be held strictly accountable for any wrongs they may commit on his behalf. Hence, if a soldier or sailor or constable unlawfully does violence to any one, he cannot plead as a defence merely that he was acting under orders from his superior officer, or even from the King himself⁴.

¹ One female bigamist tried in 1920 had been assured, by the authorities of the asylum in which her incurably insane husband had been confined for eleven years past, that his incurableness had set her legally free to marry again; a man, tried also in 1920, had honestly believed that his wife's elopement with an adulterer had *ipso facto* dissolved the marriage. A frequent error is that a mere decree *nisi* effects an immediate dissolution; cf. p. 305 *infra*.

² Especially in the case of a foreigner; 18 Cr. App. R. 6.

³ Cf. 7 C. and P. 456; p. 130 n. *infra*; and L. R. [1921] 2 K. B. at p. 125.

⁴ *Infra*, p. 78; cf. Pollock on Torts, ch. iv. s. 1; and Kenny's *Cases on Tort*, pp. 122-6. See Hallam's *Constitutional History*, ch. i. p. 3, and ch. vii. p. 526, as to this peculiarly English check upon royal authority.

Of course such orders, when not *obviously* unlawful, may be relevant to his defence under some more general rule of law. They may give him such a "claim of right"¹ as renders it no larceny for him to appropriate another man's goods; or such grounds for supposing the surrounding circumstances to justify his conduct as will render this Mistake of Fact² a valid defence.

And, more than this, by a special rule as to Public Subjection, a mistake even of Law may afford a defence to a public servant who has obeyed unlawful orders under a reasonable (though mistaken) belief that they were lawful. Thus when violence is exercised by a gaoler or hangman in carrying out an invalid sentence, then, though the violence was criminal, yet if the Court which passed the sentence had jurisdiction over the offence, and the sentence had all reasonable appearance of validity, the man's public official subjection affords him immunity³.

There is not yet, however, any conclusive English authority for extending to the military and naval forces the degree of immunity which the common law thus concedes to gaolers and other civil functionaries. A marine who, to obey orders, shoots a boatman who insists on rowing up to the ship, will probably be held⁴ not guilty of murder if he knew that the orders were given lest the boatman should promote a mutiny on board; for such orders he might reasonably suppose to be lawful. Yet he clearly would be guilty if he knew them to be

¹ *Infra*, p. 204.

² *Supra*, p. 66.

³ 9 Coke 68; 1 Hale 496; 1 Hawkins, ch. xxviii.; 1 East P. C. 331. See the authorities cited in *Marks v. Frogley*, L. R. [1898] 1 Q. B. at p. 404. Cf. 3 C. and K. 199. No less a judge than Willes, J., on the trial of a fireman, named Trainer, for manslaughter by a railway accident, laid it down (*The Times*, Aug. 4, 1864) that "in a criminal case an inferior officer must be held justified in obeying the directions of a superior that are not obviously improper or contrary to law." And he held this to extend even to a fireman's private obligation to obey his engine-driver.

⁴ *Rex v. Thomas* (Russell on Crimes, 8th ed., p. 774. Cf. 4 F. and F. 763, 806; and L. R. [1898] 1 Q. B. at p. 404; *Reg. v. Smith*, 17 Cape of Good Hope 561, K. S. C. 60; *Rex v. Bekker*, 18 South African Law Journal 421; and Stephen's *Hist. Cr. Law*, I 205.

given from a mere desire to keep the ship agreeably isolated. The official British Manual of Military Law admits it to be still "somewhat doubtful" (ch. VIII, par. 95) how far a superior officer's specific command, even one not obviously improper, will excuse a soldier for acting illegally. But the courts of the United States have repeatedly refused to recognise any such excuse at all; and insist that a soldier or sailor cannot plead his commander's orders as a defence unless they not merely seemed to be legal but actually were so¹. See *United States v. Jones* (3 Washington 218); *Commonwealth v. Blodgett* (12 Metcalf 56); and *United States v. Carr*, A.D. 1872 (1 Woods 480). This extreme American doctrine is ridiculed by French jurists as "*la théorie des baïonnettes intelligentes*."

Private civil subjection has been of more frequent importance than *Public*, as a defence. It never afforded exemption to servants or children who committed crimes at the instigation of a master or a parent. Only in the case of conjugal subjection did it ever amount to a defence. For if a wife² committed an ordinary felony in her husband's actual presence and by his instructions, the common law raised a *primâ facie* presumption that she had committed it under such a compulsion as to entitle her to be acquitted; even though there were no proof of any actual intimidation by him. (Yet for any crime committed by her when he was not actually present, his previous orders or threats would afford her no more excuse than those of any other instigator³ would do.) This presumption of coercion never applied in mere non-indictable offences. But it extended (so the majority of writers⁴ assert) to all misdemeanors, except those that are connected with the management of the house (for in that matter the wife is assumed to be the person chiefly active).

¹ For the different views of English, Scotch, American and South African courts see the cases in K. S. C. pp. 59-62.

² Not a mere concubine; *Rex v. Court*, 7 Cr. App. R. 127.

³ Cf. p. 74 *infra*.

⁴ And so Lord Birkenhead's committee of 1922 reported. Cf. *Reg. v. Torpey*, 12 Cox 45; *Rex v. Smith*, 12 Cr. App. R. 42.

And it extended to most felonies¹, *e.g.* to burglary, larceny, forgery; but not to felonies of extreme gravity, such as treason and murder. Still, as we have said, this presumption of subjection was only a *primâ facie* one; rebuttable by proof that the wife took so active a part in the crime as to shew that her will acted independently of her husband's².

The singular privilege thus accorded to the wife, yet denied to the child, admits of a curious historical explanation. "Benefit of clergy"—the right³ of any man, who could read, to escape capital punishment—was denied to women until 1692⁴. Hence, whenever a man and his wife were charged with jointly committing any felony, the man, if he could make a semblance of reading, would get off, whilst the woman, though probably the less guilty of the two, would be sentenced to death. This injustice was evaded by the establishment of this artificial presumption of conjugal subjection.

The Criminal Justice Act, 1925, abolishes this anomalous defence, as from June 1st, 1926. It provides (s. 47) that "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished. But on a charge against a wife, for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband."

It may perhaps be convenient, though not strictly relevant, to mention here that there are a few cases in which even an act itself, otherwise criminal, that has been done by a wife, will cease to be *reus* because of its connexion with the relations between her and her husband. Thus, if a husband who has committed a crime is received and sheltered by his wife, she (see p. 89 *infra*) is not regarded by the law as becoming by

¹ Kelyng 31 (K. S. C. 66). In 1891 Cave, J., allowed it in arson.

² *Reg. v. Cruse*, 2 Moody 53 (K. S. C. 66).

³ *Infra*, p. 486.

⁴ Hence under Charles II and James II, though (just as now) few women were tried, I find them form about two-sevenths—sometimes even a majority—of those sentenced to death at each Old Bailey sessions.

such "bare reception" an accessory after the fact (or a participator in his treason); for she is bound to receive him. Again, in consequence of the conjugal unity by which the married pair are—for some purposes—regarded in law as constituting only a single person, no criminal agreement to which they are the only parties can amount to the crime of conspiracy p. 289 (see *infra*); for a conspiracy needs two conspirators. And, similarly, a libel published against a husband by his wife, or one against a wife published by her husband, constitutes no offence¹.

(2) *Duress per minas* is a very rare defence; so rare that Sir James Stephen, in his long forensic experience, never saw a case in which it was raised. Consequently the law respecting it remains to this day both meagre and vague. It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse *some* crimes that have been committed under the influence of such threats. It is impossible to say with precision for what crimes the defence will be allowed to avail. It certainly will not excuse murder. Yet it may excuse the still graver offence of treason, though only in its minor forms: as where a prisoner shews that under pain of death, or of some physical injury falling little short of death, he was forced into giving some subordinate assistance in a rebellion. But he must shew that the compulsion continued throughout the whole time that he was assisting; and that he did no more than he was obliged to do; and that he desisted at the earliest possible opportunity². Moreover, according to Sir James Stephen, this defence is admissible, only where the prisoner has been threatened by a plurality of persons. Yet it would seem, on principle, that two persons may differ so much in strength, or in weapons, that a degree of compulsion sufficient to exempt may have been exercised

¹ *Reg. v. Lord Mayor of London*, L. R. 16 Q. B. D. 772.

² *Rex v. McGrowther*, Foster 13 (K. S. C. 56). Cf. supplies, or transport-service, requisitioned by an occupying Invader; Westlake's *International Law*, II. 96; *Rex v. De Jager*, 22 N. L. R. 62 (South Africa).

by one of them over the other, although there was but this single threatener.

Fears of some lesser degree of violence, insufficient to excuse a crime, may nevertheless mitigate its punishment. Wherever there are two criminals, one of them is always to some extent in terror of the other. In such a case the timid rogue will usually deserve a less severe punishment than his masterful associate.

(3) *Necessity*. The fact that a man who has inflicted harm upon another's person or property, did so for the purpose of saving the community from a much greater harm, has from early times been recognised as a defence in civil actions, brought to recover compensation for the harm thus inflicted¹. It is admittedly no tort to pull down houses to prevent a fire from spreading², or to enter a person's house to put out a fire. It would therefore seem natural that such necessity should be still more readily admissible as a defence to criminal proceedings. For in them the object is not to compensate mere loss but only to punish actual guilt (which here seems almost or altogether absent); and punishment itself must fail to attain its great object, that of Deterrence, in those cases of necessity where the evil it threatens is less than the evil which would have been suffered if the crime had not warded it off. So a person who commits some trivial offence, for the purpose of saving life—who goes at night, shall we say, on a lampless bicycle to fetch the fire-engine—might seem to have a valid legal excuse. Yet though theoretical writers have been willing to accept this ground of defence, there is no English case in which the defence has been actually raised with success. Yet Lord Mansfield gave an *obiter dictum* that even an act of treason, like the deposition of a colonial governor by his Council, might, in some circumstances of public danger, be justified by its necessity³. It has

¹ For necessity as a civil defence, see Pollock on Torts, 6th ed. p. 168.

² Dyer 36 b. See Kenny's *Select Cases on Torts*, pp. 161–170.

³ *Rex v. Stratton*, 21 St. Tr. 1222. The correctness of this dictum was conceded by Lord Coleridge in *Reg. v. Dudley* (see next page).

always been thought that if provisions run short during a voyage, the captain of the ship commits no larceny by breaking into the cargo to feed his crew. In *Gregson v. Gilbert*¹, which was an action on a policy of marine insurance to recover the value of a hundred and fifty slaves, who had been thrown overboard during a voyage because the casks of water were running short and a hundred slaves had already died of thirst, no doubt was suggested, either by the Court or even at the bar, as to extreme necessity being capable of excusing even so awful an act as this. But there the question of criminal liability did not directly arise; and now, since *Reg. v. Dudley*, it seems that the criminal law would concede no exemption, on the ground of necessity, for such an act of homicide.

Clearly no such defence can be accepted in any case (1) where the evil averted was a less evil than the offence committed to avert it, or (2) where the evil could have been averted by anything short of the commission of that offence, or (3) where more harm was done than was necessary for averting the evil. Hence it is scarcely safe to lay down any more definite rule than that suggested by Sir James Stephen, viz. that "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand²."

In the only English case where this defence has been expressly raised, it failed³. Three men and a boy escaped in an open boat from the shipwreck of the yacht *Mignonette*. After having passed eight days without food, the men killed the boy in order to eat his body. Four days later, they were rescued by a passing ship. On their arrival in England, two of the men were tried for the murder of the boy. Lord Bacon had suggested (*Maxims*, v) that if two shipwrecked men were clinging to a plank which was only sufficient to support one, and one of them pushed the other off, he would be exempt

¹ 3 Douglas 232.

² *Hist. Crim. Law*, II. 109.

³ *Reg. v. Dudley and Stephens*, L. R. 14 Q. B. D. 273 (K. S. C. 61).

from any criminal liability, because his conduct was necessary to save his life¹. But the Court of Queen's Bench declared emphatically that there is no general principle of law which entitles a man to take the life of an innocent person in order to preserve his own. The court appears to have been willing, if necessary, even to overrule Lord Bacon's dictum about the plank; but Sir J. Stephen considers that their actual decision does not go so far as to overrule it. For, as he points out, the accused man does no direct bodily harm to the other, but leaves him still the chance of getting another plank; whereas in the *Mignonette* case the boy was actually killed, and moreover by men who did it for the sake of avoiding a starvation which the jury only found to have been otherwise "*probable*," not otherwise "*inevitable*"².

The defence of necessity, however, can only be important where, as in capital offences, there is a prescribed minimum of punishment. For in all others every English judge would take the extremity of the offender's situation into account, by reducing the sentence to a nominal penalty³.

Yet where immediate death is the inevitable consequence of abstaining from committing a prohibited act, it seems futile for the law to continue the prohibition, if the object of punishment be only to deter. For it must be useless to

¹ Hale's *Pleas of the Crown*, 54. Much legal controversy was aroused in France in 1898 by a judgment at Amiens which adopted Bacon's lenient principle; for Hale's view is more generally adopted by French judges.

² Stephen, *Dig. Cr. Law*, Art. 33. He also maintains that the circumstances of *Reg. v. Dudley* distinguish it from many cases in which there is a choice of evils; for instance, where an accoucheur finds it necessary to destroy a child at the approach of birth in order to save the mother (an act that is never made the subject of a prosecution). Still more is it distinguishable from those in which the question is not which one shall live, but whether any shall live; as where three mountaineers are roped together, but two of them slip, and the third cuts the rope to save himself from being dragged to death with them. See Plowden 13 for a prisoner's escaping from a burning gaol, to save his life.

³ But in continental countries (where a minimum is frequently set to punishments) the necessity of averting grave bodily harm is often raised as a defence. See the penal codes of Italy (s. 49), Germany (s. 54), Hungary (s. 80), Switzerland (s. 40), Spain (s. 8 (10)), Belgium (s. 71).

threaten any punishment the threat of which cannot have the effect of deterring¹. Hence, perhaps, it is that in the United States the defence of Necessity seems to be viewed with favour².

To these three primary groups of cases (see above, p. 49) where unquestionably a criminal act goes unpunished for lack of the necessary *mens rea*, Blackstone (iv. 32) adds a supposed fourth one: "Where the will is too perfect to do wrong." For, by a totally unnecessary legal fiction, he ascribes the King's unquestionable immunity from criminal liability to an imaginary "perfection" in his will, which Blackstone supposes to render him incapable of *mens rea*. But it is clear that our law does not really regard the King as incapable of committing crime; inasmuch as, though it will never punish him, it would readily punish, as an accessory before the fact, any evil counsellor who might prompt him to a crime. The King has indeed himself an exemption from liability; but it is sufficiently explained by the absence, in our Constitution, of any tribunal possessed of jurisdiction to try him. It is thus a mere matter of adjective law; and not the result of any fiction in our substantive law.

But, whichever be the proper branch of law to class it under, the exemption itself is dictated by a wise policy. Almost every nation has considered it necessary to clothe its Chief Magistrate with this immunity. (It is true that in the United States the personal responsibility of the President for any crimes he may commit is fully recognised³; but the particular circumstances under which the States framed their

¹ At a court-martial held (*The Times*, July 28, 1893) in consequence of a collision, it was shewn that naval discipline regards even disobedience to an Admiral's orders as being excusable by necessity, *e.g.* the paramount necessity of not endangering the safety of a ship.

² *Commonwealth v. Brooks*, 99 Mass. 434; *State v. Wray*, 72 N. C. 253; *Nixon v. State*, 76 Indiana 524; *Church v. U.S.*, 143 U. S. 459. In *Rice v. Georgia* (34 S. E. R. 202) a man prosecuted for breach of a statute that forbade taking alcoholic liquor to church, pleaded that it was necessary for his wife's life that she should always have alcohol at hand. But the defence was disallowed, as it was not necessary for the wife to go to church.

³ Constitution of U.S.A., art. II. s. 4. Cf. *The Federalist*, no. 69.

constitution sufficiently account for this unusual liability.) At the trial of Charles I, even the Parliament's counsel admitted¹ the correctness of a judicial dictum, of Henry VII's time, that "If the King should, in passion, kill a man, this would be no felony for which to take away the King's life."

The like immunity conceded to every foreign sovereign and his ambassadors and their suites, whilst resident in this country (cf. p. 93 n. *infra*), must be remembered². In some recent cases of the unlawful driving of motor-cars, it has had practical results.

¹ 4 State Trials, 1034. Cf. Anson's *Law of the Constitution*, II. 4, 453.

² Hall's *International Law*, II. 4. 49, 50; Westlake's *International Law of Peace*, chap. XI. In Lord Halsbury's *Laws of England* the immunity of ambassadors and their suites is asserted at VI. 429, 432; but denied at IX. 245. They must not even be subpoenaed as witnesses. In 1913 a secretary of the Danish embassy was drowned in the Thames; and the embassy claimed (with success) that no inquest could be held on his body.

See *The Times* of Oct. 27, 1896, as to the kidnapping of Sun Yat Sen (afterwards twice President of the Republic of China) in the London residence of the Chinese Imperial Legation.

See *Musmann v. Engelke* (L. R. [1928] 1 K. B. 90) as to the *conclusiveness* of a certificate from our Foreign Office about a person's possessing diplomatic privilege.

As to semi-sovereign rulers, like the protected Indian princes, see *Statham v. Statham*, L. R. [1912] P. 92.

CHAPTER V

INCHOATE CRIMES

WE have seen that where there is merely *mens rea*, there is no crime at all. But though an *actus reus* is thus necessary, there may be a crime even where the whole of the particular *actus reus* that was intended has not been consummated. If an assassin misses the man he shoots at, there is clearly no murder; but nevertheless a crime has been committed. For the law will punish acts that constitute even a very early stage in the preparations for an *indictable* crime.

But, just as the mere *mens rea* is not punished, so neither are the earliest conceivable stages of the *actus reus*. There is thus, as a general rule (leaving out of view, at present, the anomalous case of Treason, see p. 267 *infra*), no criminal liability where a *mens rea* has only been followed by some act that does no more than manifest the *mens rea*. Liability will not begin until the offender has done some act which not only manifests his *mens rea*, but also goes some way towards carrying it out. Three classes of merely incipient or inchoate crimes proceed far enough to become punishable: Incitements, Conspiracies, Attempts.

(1) In *Incitement*, the act takes the form of soliciting some other person to commit a crime¹. This is a misdemeanor², even though that person never does commit the ultimate crime thus suggested to him³. If he do commit it, the inciter becomes still more guilty; being liable as an "accessory before the fact⁴," if the suggested crime be a felony, and liable as a principal offender, if it be a misdemeanor.

¹ *Rex v. Higgins*, 2 East 5 (K. S. C. 83). But this desired crime must (except in a few statutory cases) be an *indictable* one. To "counsel or procure" the commission of a *non-indictable* crime will, however, itself become a petty offence if the offence counselled come to be actually committed.

² Punishable with fine and imprisonment.

³ *Reg. v. Gregory*, L. R. 1 C. C. R. 77. Or even *could not* commit it, provided that the inciter supposed that he could; 63 J. P. 790.

⁴ *Infra*, p. 87.

(2) In *Conspiracy*¹, the mere agreement of two or more persons to commit a crime is regarded by the law as an act sufficiently proximate to the contemplated offence to render these persons guilty at once of a crime. Even a conspiracy to do no more than incite some one else to commit a crime would be criminal.

(3) *Attempts* constitute the most common form of inchoate crime. They consist in some physical act which helps, and helps in a sufficiently "proximate" degree, towards carrying out an *indictable* crime that is contemplated. But no abstract test can be given for determining whether an act is sufficiently proximate to be an "attempt." It is clear that mere Preparations for the intended crime, antecedent to the actual commencement of the crime itself, do not amount to an indictable attempt². Thus if a man, who contemplates murder, buys a pistol and takes a railway ticket to the place where he expects to find his intended victim, these are mere acts of preparation, too remote from the actual Perpetration to constitute an attempt. But if, on meeting the victim, he points the pistol at him and puts his finger on the trigger, he does acts which are a part of the offence of murder—and, similarly, of that of shooting with intent to wound—and certainly will amount to an "attempt" to commit either of those two crimes. And if a death by only a *slow* poisoning be intended, yet the administration of even the first dose (weak and non-fatal) is a sufficient attempt³.

So again, the buying a box of matches would not be an act sufficiently proximate to the offence of arson to constitute an attempt to commit it; for it is an ambiguous act, not necessarily referable to that crime, or to any crime at all.

¹ *Infra*, p. 289. In a Conspiracy (*unlike* Incitement and Attempt) the crime aimed at need not be an indictable one; and, *as* in Incitement and Attempt, it probably need not be a possible one, *e.g.* a conspiracy to kill a man who really is already dead (see Wills, J., 24 Q. B. D. at p. 421, but cf. 34 T. L. R. 140).

² *Rex v. Robinson*, L. R. [1915] 2 K. B. 342. Yet they will often afford evidence of Conspiracy.

³ *Rex v. White*, 4 Cr. App. R. 257.

But, on the other hand, actually striking one of the matches at a haystack, for the purpose of setting fire to the stack, would be a sufficient "attempt" to commit this arson¹. And it will remain so, even if the match goes out—or is snatched away from the prisoner, or is thrown away by him on finding himself detected—before any hay has caught fire at all. Another illustration of this dividing line may be found in cases relating to the publication of seditious or defamatory books. Merely to preserve such a book, even with a view to publish it, is not an attempt at publication, nor is a journey with the aim of procuring such a book². But actually procuring it, with intent to publish it, would be³.

It was for a time thought that a person could not be convicted of an attempt unless the attempted act were possible. Thus for a thief to put his hand into a person's pocket which happened to be empty, was not regarded as amounting to an attempt to commit larceny⁴. This doctrine has, however, been definitely overruled⁵.

The offence attempted may itself be only an inchoate form of crime. Thus a conviction may be obtained for an attempt to incite, or an attempt to conspire⁶. But, as it is of the essence of an attempt to be itself merely inchoate, it will be a good defence to an indictment for an attempt if the prisoner can shew that he actually completed the intended crime. For, thereupon, the attempt became merged in the greater offence⁷;

¹ *Reg. v. Taylor*, 1 F. and F. 511. Cf. *infra*, p. 252. ² *Dearsley*, 551.

³ Contrast, similarly, 11 Cr. App. R. 111 with 11 Cr. App. R. 124.

⁴ *Reg. v. Collins*, L. and C. 471. Nevertheless it was punishable as an "assault with intent to commit a felony" (*infra*, p. 159).

⁵ *Reg. v. Brown*, L. R. 24 Q. B. D. 357; *Reg. v. Ring*, 61 L. J. R. (M. C.) 116 (K. S. C. 88). Nevertheless it may be that there are *some* forms of impossibility which the law would still regard as preventing an Attempt from being criminal. Thus, although shooting at a distant man with a pistol that will not carry far enough would be an indictable attempt, there is some authority for saying that shooting at a post, which you mistake for a man, would not be. See *Rex v. Osborn* (84 J. P. 63). Cf. L. and C. 373-4.

⁶ Or an attempt to incite to conspire.

⁷ *Rex v. Higgins*, 2 East, at p. 20, *per* Grose, J.; *Reg. v. Meredith*, 8 C. and P. 589. Similarly an Incitement will merge in the completed crime. But a Conspiracy will not; see p. 290 *infra*.

and he must be reindicted if he is to be punished. If, however, on the other hand, a man indicted for some crime turns out to have done no more than attempt it, it is now provided by statute¹ that he may, even on the original indictment, be convicted of the mere attempt; thus avoiding the trouble of a new indictment and a new trial.

At common law, every attempt to commit any indictable crime, whether that ulterior crime be felony or misdemeanor, is itself a misdemeanor²; and is punishable with fine and imprisonment with hard labour. But by statutes some particular attempts have themselves been made felonies; thus, every attempt to murder is now a felony, and punishable with penal servitude for life³.

By an "Endeavour" some act *less* than an Attempt is meant; (20 Cr. App. R. 78).

¹ 14 and 15 Vict. c. 100, s. 9.

² *Reg. v. Hensler*, 11 Cox 570.

³ 24 and 25 Vict. c. 100, s. 11. This does not include attempts to commit suicide; see p. 114 *infra*.

CHAPTER VI

THE POSSIBLE PARTIES TO A CRIME

CRIMES are often grouped by English lawyers into three classes—Treasons, Felonies and Misdemeanors. In the gravest, and also in the least grave, of these three, no legal distinction, either of substance or even of form, is drawn between the various recognised modes of taking part in the commission of them. For the guilt of even the slightest share in any Treason is regarded as being so heinous that it is needless to distinguish it from still deeper shades of guilt. And, on the other hand, no activity in a mere Misdemeanor is considered heinous enough to make it worth while to draw a formal distinction between it and any less prominent mode of taking part in the offence. Hence if a crime belongs to either of these two opposite extremes, all persons who are concerned in it in any way—whether by actually committing it, or only by keeping near in order to assist whilst it is being committed, or merely by suggesting its commission—are indiscriminately classed together by the law as being alike “principals” in the offence.

But the intermediate group of crimes, viz. Felonies, appeared to be neither so grave nor so trivial as to make¹ it useless to take some formal notice of the gradations of guilt that arise from the variety of ways in which men may be concerned in them. And in the case of Felonies these distinctions still continue to be drawn, though their practical importance has now almost entirely disappeared. An accurate comprehension of them is, however, still of great value to the student as enabling him, not merely in Felonies but also in Treasons and Misdemeanors, to trace with precision the lines at which the law ceases to take notice of participation in a

¹ See Stephen, *Hist. Crim. Law*, II. 221–241; *Digest Crim. Law*, Arts. 36–47; Pollock and Maitland, II. 507–509.

crime—the stages, in other words, where Complicity ends and Immunity begins. Four several ways of taking part in a felony are recognised: (1) a principal in the first degree, (2) a principal in the second degree, (3) an accessory before the fact, (4) an accessory after the fact.

(1) By a *principal in the first degree*, we mean the actual offender—the man in whose guilty mind lay the latest blameable mental cause of the criminal act. Almost always, of course, he will be the man by whom this act itself was done. But occasionally this will not be so; for the felony may have been committed by the hand of an innocent agent who, having no blameable intentions in what he did, incurred no criminal liability by doing it. In such a case the man who instigates this agent is the real offender; his was the last *mens rea* that preceded the crime, though it did not cause it immediately but mediately. Thus if a physician provides a poisonous draught and tells a nurse that it is the medicine to be administered to her patient, and then by her administration of it the patient is killed, the murderous physician—and not the innocent nurse—is the “principal in the first degree¹.” Similarly, if a man sends a six-year-old child² into a shop to steal something out of it for him, the man himself will be principal in the first degree in this theft. Thus if you hand in to your master’s book-keeper a lying statement of money matters, and he believes it and makes entry of it, you are yourself indictable for the offence of “falsifying” the master’s account-books in which the untrue statement was so entered³. Even an animal may be employed as an “innocent agent.” For, just as anyone who sets a dog upon people is himself guilty of assaulting them, so any one who should send his trained retriever to purloin meat from a butcher’s stall, might be convicted of the larceny of the meat, as a principal in the first degree; and this, even though he were out of sight when the dog took it.

¹ Kelyng 52 (K. S. C. 79); *Rex v. Saunders*, Foster 371 (K. S. C. 81).

² *Reg. v. Manley*, 1 Cox 104 (K. S. C. 78).

³ *Reg. v. Butt*, 15 Cox 564.

There may, of course, be more than one principal in the first degree. Thus all the members of a gang of poachers may have fired simultaneously at the keeper who has surprised them. Or both the father and the mother of a little child may have together concurred in starving it. And persons may be thus joint principals in the first degree, even though one of them commits his share of the crime in one town whilst his colleague commits his in quite a different one.

(2) A *principal in the second degree* is one by whom the actual perpetrator of the felony is aided and abetted at the very time when it is committed. For instance, a car-owner sitting beside the chauffeur who kills some one by over-fast driving; or a bigamist's second "wife," if she *knows* he is committing bigamy. (In early law he was not ranked as a principal at all, but only as a third kind of accessory—the accessory *at the fact*.) This subordinate principal may or may not be actually present at the scene of the crime. Instances of persons who aid and abet a felony at the place itself¹ are afforded by the seconds in a prize-fight which ends fatally; or even by mere spectators if they actively encourage such a contest even by mere applause. But a spectator's presence at a prize-fight does not of itself constitute sufficient encouragement to amount to an aiding and abetting², and therefore does not necessarily make him punishable as a party to it. On the other hand, a man may effectively aid and abet a crime, and at the very moment of its perpetration, without being present at the place where it is perpetrated. Thus, when *A* is inside a house, committing a burglary, *B* and *C* may be waiting outside it, ready to help him in carrying off the plunder or to protect him by giving warning of the approach of the police³. A prize-fight will usually have sentinels thus on the alert. In a case in Ohio, a man who invited

¹ *Reg. v. Swindall* (K. S. C. 74); contrast *Rex v. Mastin* (K. S. C. 77). "The surgeon who attends a duel, to *save* the lives imperilled, attends it as a criminal"; L. R. 8 Q. B. D. at p. 536.

² *Reg. v. Coney*, L. R. 8 Q. B. D. 534. Cf. 12 Cr. App. R. at p. 246.

³ Foster 350. Cf. *Reg. v. Griffith*, Plowden 97 (K. S. C. 73).

a shop-keeper to accompany him to a convivial gathering, and took care to keep him agreeably occupied at it while some accomplices broke into his shop, was held to have been giving, even at the moment of the burglary, a sufficiently effective assistance in it to render him a principal in the second degree¹.

An aider and abettor is only liable for such crimes committed by the principal in the first degree as were done in execution of their common purpose². Thus if burglars find themselves interrupted by the master of the house which they have broken into, and one of them shoots him, the other burglar will be in no way liable for this murder, unless they had jointly resolved to resist interruption at any cost.

(3) An *accessory before the fact* is a person who procures or advises³ one or more of the principals to commit the felony⁴. This definition requires from him an instigation so active that a person who is merely shewn to have acted as the stakeholder for a prize-fight, which ended fatally, would not be punishable as an accessory. The fact that a crime has been committed in a manner different from the mode which the accessory had advised, will not excuse him from liability for it. Accordingly if *A* hires *B* to poison *C*, but *B* instead kills *C* by shooting him, *A* is none the less liable as accessory before the fact to *C*'s murder. But a man who has counselled a crime does not become liable as accessory if, instead of any form of the crime suggested, an entirely different offence is committed. An exception, however, arises where the crime counselled was one which was itself likely to cause

¹ *Breese v. State*, 12 Ohio 146.

² Usually there is a purpose agreed on between the two. But a man who does something, which he knows will assist an intended crime, is liable as aider and abettor, even though the main offender is unaware of this support. See 13 Cr. App. R. 166.

³ Even to know that some crime, of a specified kind, is intended, and to supply the means that might be used in it, is not enough; instigation is necessary: *Rex v. Lomas*, 9 Cr. App. 220. Cf. L. and C. 161.

⁴ Therefore there can be no accessory before the fact in "voluntary" (i.e. unpremeditated) manslaughter. See p. 116 *infra*.

this other crime that actually was committed; so if, when *A* has hired *B* to murder *C*, *B* by mistake kills *C*'s twin brother *D* instead, *A* may be convicted as an accessory to *D*'s murder. Yet in *Saunders' Case*¹, where one man had instigated another to give a woman a poisoned apple, but she innocently handed on this apple to her child, who died from eating it, there was held to be no such likelihood as would render the original instigator an accessory to the murder of the child.

The student should notice that in criminal law the word "principal" thus suggests the very converse of the idea which it represents in mercantile law. In the former, as we have seen, an accessory proposes an act, and the "principal" carries it out. But in the law of Contract, and in that of Tort, the "principal" only authorises an act, and the "agent" carries it out². Where the same transaction is both a tort and a crime, this double use of the word may cause confusion. For example, if, by an innkeeper's directions, his chamber-maid steals jewels out of a guest's portmanteau, the maid is the "principal" in a *crime*, wherein her master is an accessory before the fact; whilst she is also the agent in a *tort*, wherein her master is the "principal."

As we have already seen, to participate in a treason or a misdemeanor in either the second or the third of the modes now enumerated would constitute, not only an act of crime, but an act which the law does not distinguish (as it does in the case of felonies) from that of the "principal in the first degree." It is wholly immaterial, for all technical purposes, whether a misdemeanant was principal at the fact or before the fact.

(4) But the *accessory after the fact* stands in a fourth and remoter degree of complicity, which in the case of misdemeanors³ involves no criminal responsibility at all. An

¹ Plowden 475; Foster 371 (K. S. C. 81).

² South African lawyers use the terms thus, even as to Crimes.

³ Or of the petty offences punishable summarily.

accessory of this species is a person who, knowing that a felony has been committed, subsequently shelters or relieves one of the felons (even one who was a mere accessory) in such a way as to enable him to elude justice. He may do this, for instance, by concealing a fugitive murderer in his house or supplying him with the means of escape¹, or by helping a convicted murderer to get out of prison. Active assistance to the felon is thus necessary². Hence merely abstaining (however wilfully) from arresting a known felon, and so leaving him to make his escape, is not enough³ to make the sympathiser guilty, as an accessory, of the felony itself. (But it does make him guilty of the specific misdemeanor of a Misprision of Felony⁴. Similar merely passive connivance in a treason would, in like manner, be a Misprision of Treason. For crimes so grave as felonies or treasons ought to be disclosed to a magistrate by every one who knows of them. But in the case of mere misdemeanors there is no such duty.) It should be noted that, since it is a wife's duty to aid her husband and to keep his secrets, she incurs no⁵ liability if, after he has committed a felony, she hides him from justice. But a husband enjoys no similar exemption when he assists a felonious wife; he becomes accessory to her felony.

Even in felonies but little practical importance now attaches to the distinctions between the first *three* of these four classes of "accomplices"—(a term which the law applies to all the *participes criminis*, whatever their degree of "complicity" in the offence, though popular use generally limits it to those who take only a minor part). For the maximum punishment prescribed for any given crime is the same in the case of all three classes. And similarly the mischievous rule of the old common law, that the accessories to a crime could not be convicted until their principal was convicted (though he perhaps might be acquitted utterly unjustly or might die before he

¹ Or destroying dangerous evidence; *Rex v. Levy*, 7 Cr. App. R. 61.

² *Reg. v. Chapple*, 9 C. and P. 355 (K. S. C. 82). But it need not be to him *personally*; as *Rex v. Levy* shews.

³ Y. B. 9 Hen. IV. pl. 1.

⁴ *Infra*, p. 279.

⁵ *Supra*, p. 73.

could be arrested), has long ago been abolished by statute; so that now all accessories whether before or after the fact may be indicted even though the principal felon has not yet been convicted, or even is not amenable to justice¹. Moreover, by a bold application of the principle that *qui facit per alium facit per se*, it has also been enacted that an accessory before the fact may even be indicted and convicted as himself a principal². For the man who despatches the assassin is as truly a murderer of the victim as if he had himself fired the fatal bullet. But the converse does not hold good; if a principal is indicted as an accessory he cannot be convicted.

In modern times, the only important surviving difference between the various grades of accomplices consists in the fact that a much more lenient punishment is awarded to the man who is only an accessory *after* the fact. Instead of being, like accessories before the fact, liable to the same heavy maximum of sentence as the principal, he is punishable with nothing more than two years' imprisonment, with or without hard labour; (except in the case of murder, where the maximum punishment for an accessory after the fact is penal servitude for life).

It is scarcely necessary to say that a man may be accomplice in more than one way to the same act of crime; and thus he may be convicted on one count as an accessory before the fact, and on another count as an accessory after the fact³. For that famous and still mysterious crime, the murder of Sir Edmondsbury Godfrey in 1678, Atkins (the secretary of Pepys the diarist) was indicted both as an accessory before the fact and also as a principal⁴.

¹ 24 and 25 Vict. c. 94, ss. 1, 3.

² 24 and 25 Vict. c. 94, s. 2. See *Reg. v. James*, L. R. 24 Q. B. D. 420 (K. S. C. 81).

³ 8 C. and P. 43.

⁴ 6 St. Tr. 1491.

CHAPTER VII

THE CLASSIFICATION OF CRIMES

PUBLIC wrongs, Pleas of the Crown, or—to use a phrase more familiar but more ambiguous—Crimes, may be arranged, according to their technical degrees of importance, in the following series of groups.

I. Indictable offences; *i.e.* those which admit of trial by jury.

- (1) Treasons,
- (2) (Other¹) Felonies,
- (3) Misdemeanors.

II. Petty offences; *i.e.* those which can only be tried summarily, by justices of the peace sitting without a jury².

The word “Crime” is properly applicable to all these; and thus, for instance, in the Judicature Act³ the expression “criminal cause or matter” includes them all. But sometimes more restricted senses have been adopted: as when Serjeant Stephen, in re-writing Blackstone’s *Commentaries*, limits “crime” to offences that are indictable; or when Blackstone himself goes still further, and limits it to indictable offences that are graver than misdemeanors⁴.

The two groups, Indictable and Non-indictable, were originally quite exclusive of each other; but now they overlap to some extent. For, under the Summary Jurisdiction Act, 1879, some frequent indictable offences *may* under certain circumstances be tried summarily⁵ instead; whilst all such

¹ For (*infra*, p. 92) “Felony” properly includes Treasons.

² Sometimes absurdly, though officially, styled “Summary offences”! “Misdemeanor” in a wide and better sense includes these as “petty misdemeanors,” and means any offence below felony (L. R. [1928] 2 K. B. 459); whilst Blackstone (iv. 1. 5) recognises it as having also a third sense, synonymous with “Crime,” and so including even Felonies.

³ 36 and 37 Vict. c. 66, s. 47.

⁴ 4 Bl. Comm. 1.

⁵ 42 and 43 Vict. c. 49, ss. 10, 11, 12. *Infra*, ch. XXIX. Six-sevenths of all the indictable offences prosecuted are so tried.

of the petty offences as are heinous enough to admit of a sentence of imprisonment for over three months *may* instead be tried on indictment¹.

The discussion of the distinction between indictable and non-indictable offences may conveniently be postponed until we reach the subject of Procedure. But the mode in which indictable offences themselves are subdivided springs from so noteworthy a historical origin², and produces so many important consequences, as to deserve immediate consideration.

Amongst indictable crimes, the common law singled out some as being so conspicuously heinous that a man adjudged guilty of any of them must incur—not as any express part of his sentence but as a consequence that necessarily ensued upon it—a forfeiture of property, whether of his lands or of his goods or of both. Such crimes were called “Felonies.” The other, and lesser, crimes were known as “Transgressions” or “Trespasses”; and did not obtain their present name of misdemeanors until a much later date. A felony is, therefore, a crime which either involved by common law such a forfeiture, or else has been placed by statute on the footing of those crimes which did involve it. (This definition, it will be seen, includes treason; and, accordingly, the Statute of Treasons³ speaks of “treason or other felony.” But the differences of procedure between cases of treason and those of other felonies are so numerous and important that treasons have usually to be discussed apart; and hence, for brevity’s sake, the term “felony” is commonly employed as exclusive of them.)

The very word “felony” has been said⁴ to contain a reference to the forfeiture which the crime entailed, and to be derived from the words *fee*, *i.e.* feudal holding, and *lon*,

¹ 42 and 43 Vict. c. 49, s. 17.

² See Pollock and Maitland, I. 284–286, II. 463–468, 509.

³ 25 Edw. III. st. 5, c. 2. Cf. Maitland’s *Collected Papers*, I. 316.

⁴ 4 Blackstone Comm. 95. It occurs in French before 1066; but only as the name of one specific offence—the breach of a vassal’s fealty to his lord, naturally involving the loss of his feudal land.

i.e. price; felony thus being such a crime as “costs you your property.” But according to the Dictionary of Prof. Skeat the word is derived from a Celtic root, meaning “evil” (or, according to that of Dr Murray, from the Latin *fel*, “venom”); and at any rate it is akin to our English adjective “fell,” as in Shakespeare’s “fell and cruel hounds¹.”

Familiar instances of felonies are—murder, manslaughter, burglary, housebreaking, larceny, bigamy, rape; whilst the most conspicuous instances of misdemeanors are less heinous crimes, like perjury, conspiracy, fraud, false pretences, libel, riot, assault. The differences between felonies and misdemeanors are no longer so numerous as they once were. Amongst those, however, that have now disappeared there are some whose historical importance requires notice.

(1) Originally, as we have seen, every felony tacitly produced a forfeiture; whilst no misdemeanor did, and in extremely few misdemeanors could forfeiture be imposed even as an express part of the sentence. But all forfeitures for felony and treason were abolished by the Forfeiture Act, 1870 (33 and 34 Vict. c. 23, s. 1).

(2) Originally all felonies (except petty larceny) were punished with death; whilst no misdemeanor was². Hence the idea of capital punishment became so closely connected with that of felony that any statute making a crime a felony made it capital by mere silent implication; whilst in an enactment which created a mere misdemeanor even the widest general words could not suffice to make it capital³, and nothing but the most express language would suffice.

¹ Pollock and Maitland, II. 465.

² Heresy (though never a felony) was of course punishable with death; but it was an ecclesiastical offence not triable in temporal courts.

³ Hence the Statute of Anne (7 Anne c. 12) which, in consequence of the unfortunate arrest of the Russian Ambassador, subjects those who violate an ambassador’s privileges to “such pains, penalties, and corporal punishment as the court shall think fit” did not make it possible to punish this offence with death: though its framers may have hoped that “his Czarish Majesty,” whom they avowedly were attempting to appease, would be unaware that its language would be construed thus restrictively. Blackstone, I. 255.

(3) Originally, a felon could not, at his trial, call any witnesses in his defence¹, or have any counsel to defend him² (except for the argument of mere points of law); whereas a misdemeanant, like a defendant in a civil case, could have both. These disabilities were removed in 1702 and in 1826 respectively.

But the majority of the ancient differences between felonies and misdemeanors still exist in the law of the present day. The discussion of most of these may be postponed until we reach the general subject of Procedure; when we can more appropriately discuss³ those which relate to such matters as the mode of accusation, the procedure at the trial⁴, and the disqualifications produced by a conviction. But there are some differences which can more conveniently be considered now.

(1) It is, as we have already seen⁵, only in felonies that the distinction between the four classes of *participes criminis* is technically drawn, or the fourth class made criminal.

(2) When the Act of 1870⁶ put an end, as we have seen, to the forfeitures which were formerly created by a conviction for treason or any other felony, it did not restore the offender's property free of all liabilities, but justly saddled him with certain burdens which the crime itself had brought about. Thus, sec. 4 of the Forfeiture Act enables the court before which any person is convicted of felony—but not of treason—to order that he shall pay damages, not exceeding £100, for any "loss of property" which the felony has occasioned (as where cash has been given for a forged cheque). But for this enactment, the person who had suffered the loss would have had to incur the trouble and expense of bringing an action in some civil court to obtain compensation. French procedure has long permitted the intervention, in criminal

¹ 1 St. Tr. 885, 1281, 1304.

² Y. B. 30 and 31 Edw. I. App. II. p. 529.

³ *Infra*, chs. xxx. and xxxi.

⁵ *Supra*, pp. 84, 88.

⁴ *Ibid.*

⁶ 33 and 34 Vict. c. 23.

proceedings, of a *partie civile*; so as to save expense and trouble by enabling one litigation to do the work of two. But the principle is so unfamiliar in England that it has not yet been extended to misdemeanors¹.

(3) As felonies were always heinous offences, the law regarded it as of great moment that the offender should be brought to justice. Hence whenever a felony has been committed, any one who, on reasonable grounds, suspects any person of being the offender, is permitted to arrest him forthwith. And any one who actually sees a felony committed is not only permitted, but required, to do his best forthwith to arrest the felon; and may use any degree of violence that may be necessary to attain that object. But in the case of misdemeanors the common law never permitted (and it is only in particular cases that modern statutes² now permit) even the eye-witnesses of the offence to arrest the offender without first obtaining a magistrate's warrant to enable them to do so. Hence a man who steals a penny may be seized on the spot, since he is a felon. But a man who has obtained a herd of cattle by false pretences is only a misdemeanant, so the farmer had, at the common law, to let him go. On the same principle, the justices of the peace who committed a

¹ But in those light cases where any crime—whether felony or misdemeanor or even a mere petty non-indictable offence—has been committed under such extenuating circumstances (whether arising from the triviality of the act itself, or from the youth, good character, mental condition, etc. of the offender) that, although the charge is proved, the court thinks it inexpedient to inflict actual punishment, it may instead order him to pay “such damages for injury or compensation for loss” as it thinks reasonable. If the court is only one of summary jurisdiction, the sum ordered must not exceed £10; but if it be a court of assizes or quarter-sessions there is no limit (not even that of the £100 prescribed in the Forfeiture Act). See 7 Edw. VII. c. 17, s. 1 (3); and cf. *infra* ch. XXXII. *ad finem*.

The Forfeiture Act also empowered the court which convicted a person of felony or of treason to charge him with the *costs* of the prosecution. But by the Costs in Criminal Cases Act, 1908 (8 Edw. VII. c. 15, s. 6) that power is now given on conviction for *any* indictable offence; and for all non-indictable offences it already existed, under 11 and 12 Vict. c. 43, s. 18. In 1909, such an order was made on a misdemeanant in a case where the taxed costs of the prosecution exceeded £2000; 2 Cr. App. R. 228.

² *Infra*, ch. XXX.

felon for trial, have always had authority to insist, if they thought fit, on his remaining in prison until the trial took place; though a person committed for trial for misdemeanor could, at common law, insist on being released on bail if he found sufficient sureties. By modern legislation, however, the discretion which justices possess in felonies has been extended—first to many—now to all misdemeanors¹. The anxiety of the law to secure the punishment of felons led to the further rule that no person injured by a felony could bring a civil action against the felon, to recover compensation for his loss, until *after* a criminal prosecution had either taken place or (as by the death or the pardon of the offender) been rendered impossible. In misdemeanors, on the other hand, either the civil or the criminal remedy may be taken first; or indeed, in theory, both may be pursued simultaneously², though in practice such a course would never be prudent³. But it should be added that, even in the case of felonies, it is not altogether easy for a defendant to defeat a civil action by raising this defence that he has not yet been prosecuted for the wrong which is complained of. So audacious an attempt to “take advantage of his wrong” is not allowed by the courts to be raised in the form of an ordinary defence. But the defence does certainly exist; see *Smith v. Selwyn* (L. R. [1914] 3 K. B. 99)⁴. A defendant can set it up by a summons at chambers to stay the action; or the court itself may spontaneously refuse to hold the trial. The objection, however, was never regarded as applying to actions, even though connected with the felony, in which the defendant was not the felon himself, or in which the plaintiff was not the injured party himself.

(4) The heinousness of felonies is vividly shewn by the legal disqualifications which arise from the infamy of being

¹ 8 Edw. VII. c. 15; *infra*, p. 455.

² *Jones v. Clay*, 1 B. and P. 191; *Edgar's Case*, 29 T. L. R. 278.

³ Cf. *Rex v. Mahon*, 4 A. and E. 575.

⁴ See also L. R. 17 Q. B. D. 93; 16 Cox 567. Felonies of *homicide* are made an exception by 9 and 10 Viet. c. 93.

convicted of one. The convicted felon¹ loses any office or pension²; and he cannot vote for or sit in Parliament, or hold military or civil or ecclesiastical office, until after he either has been pardoned or has worked out his sentence³. These disqualifications are not entailed by any misdemeanor.

The existence of so many differences, some of them still so important, between felonies and misdemeanors naturally suggests to the student that the former class of crimes are marked by some special gravity. Yet it is not easy for him at first sight to discover on what principle the separation has been made between the crimes which are allotted to the one class or to the other. It cannot depend—like the French classification into *crimes*, *délits*, and *contraventions*—upon the degree of dignity of the tribunal before which the offender is to be tried. For a man may be tried for larceny, which is a felony, before a police magistrate, and yet for mere misdemeanors he may be impeached before the House of Lords. Nor, again, can it depend upon the amount of evil actually caused by the offence. For perjury, though it may cause the death of an innocent person, is only a misdemeanor, whilst keeping a horse-slaughterer's yard without licence is a felony⁴. Nor, thirdly, can it depend upon the gravity of the punishment. For larceny, which is a felony, and false pretences, which is a misdemeanor, are punishable alike. And the misdemeanor of conspiracy to murder is punishable with ten years' penal servitude⁵; yet the felony of stealing mineral ores is only punishable with two years' imprisonment (Larceny Act, 1916, s. 11). An arrangement which produces such

¹ Unless sentenced merely to imprisonment for twelve months or less, and without hard labour; or (8 Edw. VII. c. 67, s. 100) unless convicted when younger than sixteen.

² But in practice the pensioning authorities now deal with each case on its merits; and note any favourable report from the judge. See p. 539 *infra*.

³ 33 and 34 Vict. c. 23, s. 2.

⁴ 26 Geo. III. c. 71. The object is to prevent stolen horses from being easily disposed of.

⁵ In the period when rape was only a misdemeanor it nevertheless was punished by the loss of the offender's eyes and testicles; Hawkins, Bk. I. ch. iv., s. 7.

anomalies as these, can only be explained by considerations purely historical. It probably may be traced back to ancient times when particular offences were first found to be of such frequency and gravity as to render it no longer safe to leave them to the chance of a prosecution by the injured, in the forms of ordinary litigation. The public safety demanded a periodical public investigation by the Crown, through a jury of accusation provided for the purpose, into the question whether any offences of this deep dye had been committed. Hence arose¹ what we now know as "Grand Juries." To facilitate their operations it became necessary to frame a precise legal definition of each of the offences which they were to report about². To such offences the name of "felonies" probably soon became³ limited; and the procedure concerning them gradually acquired its peculiar characteristics. But offences less grave, or less common, were for a long time left very loosely defined (as some of them still are, *e.g.* conspiracy); and were never prosecuted in this "inquisitorial" mode, but were left as before to the "litigious" action of private persons (though in later days that action would usually be nominally taken on behalf of the Crown). These latter offences (except where statutory enactment has since erected any of them into felonies) constitute our modern misdemeanors. They, said Bracton six hundred years ago, are tried like civil actions ("civiliter intentantur"); and even now, as Sir James Stephen says, a prosecution for misdemeanor is akin to an action for tort in which the King is plaintiff and which aims at punishment and not at damages. Thus, in a trial for misdemeanor, the juryman's oath is to "truly try the *issue* joined between our sovereign Lord the King and the *defendant*." But in a felony it is to "true *deliverance*⁴ make between our sovereign

¹ See below, p. 461.

² Cf. *Eyre of Kent*, 1313 (Selden Society), I. 52, 57.

³ For an earlier and wider meaning (*i.e.* an "appealable" crime) see 2 P. and M. 466.

⁴ It is uncertain whether this refers to (1) the deliverance of the verdict, or (2) the deliverance of the prisoner (who is said to "stand on his deliverance") from custody, or (3) the jury's *deliberation* on the evidence.

Lord the King and the *prisoner* at the bar." Hence it is easy to understand why, in so many respects, the older law assimilated the idea of misdemeanors rather to that of mere civil wrongs than to that of felony; as in the conspicuous instance of its requiring a Peer to be tried by the House of Lords if the charge is one of felony, but by a jury of mere commoners if it is one of misdemeanor. In the course of time, the analogies of civil procedure have gradually caused the litigious type of procedure to supersede the inquisitorial, even in the case of felonies¹. The influence of the old inquisitorial theory, however, still survives in the conduct of all public prosecutions. Thus, in cases of homicide, every person present at the killing is usually called by the Crown as a witness, if he seem honest, even though he be manifestly hostile to the Crown. In a case of poisoning, all the chemists who have made analyses for the Crown, alike those who thought they found poison and those who did not, will be called. It is the view of English law that the Crown counsel are not "litigants" battling with the prisoner, but a royal commission of "inquirers" dispassionately investigating the truth².

We may add that long before the abolition, in 1870, of forfeitures for felony, they had ceased to be of any financial importance. The annual amounts received between 1848 and 1870 ranged only from £253 to £1317. Most felons were poor; and the rich ones disposed of their wealth between arrest and conviction. The time had come for this change.

It is quite possible that, in a perfect Criminal Code, crimes would continue to be broken into two great divisions according to their greater or lesser heinousness; and that particular

¹ But coroners still proceed inquisitorially; they obtain all the evidence they can get, whichever way it may tell.

² See 1 C. and K. 650. Similarly the judge in all criminal trials can, if necessary, call a witness whom neither party wishes to be called; (though the "litigious" nature of civil trials forbids him thus to interpose in them). And the prosecuting counsel is only a "minister of justice"; *infra* p. 482.

In trials for felony, the curious proclamation, inviting other charges against the prisoner, is a survival from "inquisitorial" procedure.

incidents both of procedure and punishment would attach to the graver class. But, in English law, great objection may be taken both, as we have seen, to the illogical manner in which particular crimes have been placed in the one class or the other, and also to some of the incidents attached to one or other of the classes. Hence the Criminal Code Bill of half a century ago, in its earlier form, abolished altogether the distinction between felonies and misdemeanors; and though the last draft, that of 1880, retained the distinction, yet it removed nearly all its importance. For it proposed that some incidents now attached to felonies should be attached only to such crimes as are punishable with death or penal servitude; whilst a few of the other incidents were to be extended to all crimes; and other incidents, again, were to be wholly abolished. There can be little doubt that, of all parts of our criminal law, none is in greater need of a thorough reconstruction than that which concerns the classification into Felonies and Misdemeanors.

BOOK II

DEFINITIONS OF PARTICULAR CRIMES

CHAPTER VIII

HOMICIDE

WE have already shewn ample ground for not adopting, as the arrangement of our successive explanations of the various crimes known to English law, the technical classification into Felonies and Misdemeanors. All writers have found it necessary to classify crimes upon a very different and more scientific principle—viz. by reference to the various kinds of interests which the respective offences violate. Thus Blackstone arranged them into those that are committed against (1) religion; (2) the law of nations; (3) the sovereign executive power; (4) the rights of the public; and (5) the rights of private individuals, whether these rights relate to (*a*) the persons, or (*b*) the habitations, or (*c*) the ordinary property, of those individuals. And, very similarly, the proposed Criminal Code of 1880 classified crimes into (1) those against public order (*e.g.* treason); (2) those affecting the administration of law and justice (*e.g.* perjury); (3) those against religion, morals, or public convenience (*e.g.* blasphemy, nuisance); (4) those against the person or reputation of individuals (*e.g.* murder, libel); and (5) those against the rights of property of individuals (*e.g.* theft). But the clearest arrangement is that of Blackstone's modern editor, Serjeant Stephen, who divides them simply into (1) offences against the persons of individuals, (2) offences against the property of individuals, (3) offences against public rights.

Following this last arrangement, our list of crimes must begin with those which affect the security of men's persons—employing here that much abused word, not in its ancient

technical legal sense of "a subject of rights and duties¹," but in the modern meaning of "the living body of a human being²." Of all such offences, that of homicide³ is necessarily the most important. And, to every student of criminal law, homicide is a crime peculiarly instructive; inasmuch as in it, from the gravity of the fact that a life has been taken, a minuter inquiry than is usual in other criminal cases is made into all the circumstances, and especially into the wrong-doer's state of mind. Hence the analysis of the *mens rea* has been worked out in homicide with great detail; whilst in regard to many other offences it still remains uncertain what precise condition of mind the accepted definitions of them are to be interpreted as requiring.

It is not, however, every homicide that is criminal. And at one time those forms of homicide which were not criminal were subdivided into two species (though the importance of the distinction has now disappeared). For the older lawyers distinguished between the homicides that were Justifiable, and those that were only Excusable. In the former the act was enjoined or permitted by the law (the slayer thus really acting on behalf of the State); in the latter, the act was thought to carry with it some taint, however slight, of blameworthiness.

(A) The homicides classed as strictly *Justifiable* have never involved any legal penalty whatever.

(1) The execution of public justice. The hangman who carries out⁴ the sentence of a competent court incurs no criminal liability. The sheriff who burnt the martyrs Latimer and Ridley at the stake was accordingly in no danger, either under Mary or even under Elizabeth, of being himself convicted of murder for having so done. His immunity was due—not, as Blackstone (IV. 28) ascribes it, to the mere absence

¹ See Holland's *Jurisprudence*, ch. VIII.

² This sense perhaps was brought into English law by Sir Matthew Hale; who has the grotesque phrase, "the interest which a *person* has in the safety of his own *person*." (*Analysis of the Law*, s. 1.)

³ See Stephen's *Hist. Cr. Law*, III. 1; *Digest*, chs. XXIII., XXIV.

⁴ If with precision; *e.g.* no change of day or of form of death.

of *mens rea* (because his act was extorted by a compulsion of official duty which overbore his own reluctance to commit it)—but to the entire absence of even an *actus reus*. It was not a crime for him to carry out the sentence; nay, it would have been a crime (though it might have been an act of moral heroism) for him to refuse to carry it out. For technical “murders,” by deviating mercifully from a sentence, see p. 278 *infra*.

(2) The advancement of public justice. Thus life may be innocently taken, if it be necessary for arresting a felon¹, or suppressing a riot, or preventing some crime of a violent² character. On the other hand, when, in 1804, the “Hammer-smith Ghost” (or a person mistaken for it) was shot on its nocturnal round, the slayer was held guilty of murder; for the masquerade thus prevented was not a violent crime but a mere misdemeanor of “Nuisance.”

(3) The defence of oneself against a wrong-doer. A man is justified in using against an assailant a proportionate amount of force in defence of himself³ or of his immediate kindred⁴ (and in the case of a *felonious* assault⁵, and probably even in lesser ones⁶, the defence of anyone else who actually needs his protection⁷). Hence if he has a reasonable apprehension of danger, and adopts none but proportionate means of warding it off, he will be innocent even though the wrong-doer be killed by the means thus adopted. But proportionate these means must be. I must not stab a child because he is pricking me with a pin. Thus a person assaulted is not justified in using firearms against his assailant, unless the assault is

¹ Cf. pp. 286, 447, *infra*; and K. S. C. 143. As to officers' indemnification for firing on air-craft that fly illegally, see 2 and 3 Geo. 5. c. 22.

² Preventing a *non-violent* crime, even a felony, would not thus justify homicide; 1 C. and P. 319.

³ *Howel's Case*, Maitland's *Select Pleas* 94 (K. S. C. 139). In 1811 Mr Purcell, of co. Cork, a septuagenarian, was knighted for killing four burglars with a carving-knife.

⁴ *Reg. v. Rose*, 15 Cox 540 (K. S. C. 140).

⁵ See 2 Bos. and P. 260.

⁶ See p. 155 *infra*.

⁷ Foster 274; Russell on Crimes, pp. 815, 818; 135 U. S. A. 80, “any bystander.”

so violent as to make him consider his life to be actually in danger. On the other hand, where a man, after hurling a bottle at the head of one Mr Cope, had immediately proceeded to draw a sword, and Cope thereupon had thrown back the bottle with violence, Lord Holt held that Cope's action was justifiable¹; "for he that hath manifested that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand." Again, self defence may sometimes lawfully take the form of attack. If a revolver be pointed at you, a blow from your umbrella may be the only possible method of self-defence. But though a blow struck merely to prevent further attacks is a justifiable self-defence, it must not be repeated for aggression; "a fair fight" is not self defence.

But where the wrong-doer is not going so far as to assault a human being, but is only interfering unlawfully with property, whether real or personal, the possessor of that property (though he is permitted by the law to use a moderate degree of force in defence of his possession), will usually not be justified in carrying this force to the point of killing the trespasser². For such a justification will not arise unless the trespasser's interference, or his resistance, amounts to a

¹ *Mawgridge's Case*, Kelyng 128. If he be blameless *from the first* it is a disputed question whether a man, defending himself against immediate danger of grievous bodily harm, is bound (as he certainly is in *Chance-medley*, p. 107 *infra*) to retreat, if possible, before killing; especially if assailed within his own house; Halsbury, ix. art. 1186; contrast 1230. Recent *obiter dicta* in England seem (cf. 18 Cr. App. R. 160) against his having the right to stand his ground. For the right, see Foster, and East's P. C. 271. The right has twice been recognised by the Supreme Court of the United States; 158 U. S. 550, 256 U. S. 335; "detached reflection cannot be demanded in the presence of an uplifted knife." Cf. *Harvard Law Review*, xvi. 567.

² So a "black-leg" vandriven must not use a pistol to defend his van from being injured by strikers; but may use it if their attempt to overturn the van endangers his own life; *Rex v. Roberts*, 75 J. P. 436. But Hale held that since "a man's house is his castle," a violent attempt to take from him the possession of it may be resisted with as great force as would be permissible in defence of his person. This view was confirmed in 1924 by the Court of Criminal Appeal in *Rex v. Hussey* (18 Cr. App. R. 160). There a tenant had inflicted shot-wounds in resistance to his landlord's illegal attempt to eject him from his room prematurely.

felony; and moreover to a felony that is violent, such, for example, as robbery, arson, or burglary. And even these extremely violent felonies should not be resisted by extreme violence unless it is actually necessary; thus firearms should not be used until there seems to be no other mode available for defeating the intruder and securing his arrest. Hence, *à fortiori*, the actual killing of a person who is engaged in committing any mere misdemeanor, or any felony that is not one of force, cannot be legally justified; anyone so killing him will be guilty of a criminal homicide.

(4) There was some old authority for maintaining that under some circumstances a man might, for the preservation of his own life, be justified in taking away the life even of a person who was in no way a wrong-doer. Thus Lord Bacon¹, reviving the ancient problem which Cicero had cited from the Rhodian moralist Hecato, suggested that where two men, swimming in the sea after a shipwreck, get hold of a plank not large enough to support both, and one pushes off the other, who consequently is drowned, the survivor will not be guilty of any crime. But, as we have seen, in *Reg. v. Dudley and Stephens*², the five senior judges of the King's Bench Division threw doubt upon Bacon's doctrine; and refused to recognise as justifiable the act of some shipwrecked sailors, who had killed a boy, in order to feed on his body, when scarcely any other hope of rescue remained.

The peaceful orderliness of modern times has of course greatly diminished the number of cases of justifiable homicide. Some three hundred felonious homicides take place in England every year; but less than a score of executions, and less than half-a-dozen other homicides that are justifiable.

(B) Beyond the strictly justifiable cases of homicide there were other cases³ which the law regarded as merely *Excusable*,

¹ Bacon's *Maxims*, v.; Cicero, *De Officiis*, III. 23; Puffendorf, 2. 6. 4.

² L. R. 14 Q. B. D. 273 (K. S. C. 61). *Supra*, pp. 75, 76.

³ Bracton, II. 284-286; 1 Hale P. C. 419-424; Stephen, *Hist. Cr. Law*, III. 77; Pollock and Maitland, *Hist. Eng. Law*, II. 471.

i.e. similarly not deserving to be made felonies and punished with death, but as nevertheless being in some degree blameable. These accordingly were punished by the forfeiture of the offender's moveable property (though ultimately it became usual for the Crown to restore all these goods except the "deodand," the instrument by which the killing had been effected¹). We have here a relic of the rough Anglo-Saxon times in which the law treated almost all homicides, heinous or innocent, as matters to be expiated by the payment of a pecuniary *wer*. Thus, so late as 1118, the compiler of the so-called *Leges Henrici I.* gives it as still the Wessex rule, that for every homicide, whether intentional or even accidental, the *wer-gild* must be paid² to the family of the slain man. Even after a more discriminating legislation had recognised, under ecclesiastical influence³, that the more heinous forms must be punished with death, some time had still to elapse before it was clearly settled what forms were on the other hand so innocent as not to deserve even a pecuniary penalty. Thus, in the thirteenth century, even the man who slew some one by mere accident still needed a royal pardon, though he received this pardon as a matter of course⁴. And subsequently it came to be settled that, even when pardoned, he would still have to forfeit not merely the deodand but all the rest of his chattels (which, however, at that period were seldom of great value). Even if it were not to him that the deodand belonged, it nevertheless would still be confiscated, in order that it might be purged from the stain of blood by being "given to God" in pious uses. Hence it was exacted not only where a human agent was thus responsible for the death, as in the case of a man on horseback accidentally

¹ Pollock and Maitland, II. 473.

² Cap. 70, s. 12. "Sive sponte aut non sponte fiant hæc, nihilominus tamen emendetur, quæ enim per inscientiam peccamus, per industriam corrigamus." Pollock and Maitland, II. 469; and (Alfred's quaint 36th Law, as to various accidents caused by carrying a spear) I. 53.

³ Glasson, *Histoire du droit de l'Angleterre*, II. 537.

⁴ Pollock and Maitland, II. 478.

riding over a man who was asleep on the highway, but even where death was due to some mere natural accident, as in the case of a man's falling from a boat and being drowned. The rule was

"Whatever moved to do the deed
Is deodand and forfeited."

But, in practice, the forfeiture of the deodand was not confined to things that had moved. A small boy fell into a pan full of milk and was thereby drowned; whereupon the pan was forfeited¹. The deodand was usually sold by the King; the purchase money, or commutation money, received for it being devoted to pious uses for the soul that had died unabsolved. After the Reformation, the money was usually handed to the poor, or to the relations of the deceased. Thus when in 1716 the coroner's jury of Yarmouth declared a stack of timber which had fallen on a child to be forfeited as a deodand, it was ransomed for 30s., which was paid over to the child's father. Deodands were not abolished until 1846². But the general forfeiture of goods caused by excusable homicide had been abolished in 1828³; so the homicides which down to that time had been classed as Excusable ceased, thenceforward, to differ at all in their legal consequences from such as were fully Justifiable. The merely Excusable cases of homicide had been the two following.

(1) Where in any *chance-medley* (i.e. "sudden combat") one of the combatants desisted from fighting, but the other continued his assault, and then the former one, having no other probable means of escape open to him⁴, killed his assailant, the necessity of self-defence prevented the homicide from being a felony. But, as at first he was to blame for his share in the affray, the case was distinguished from the strictly "justifiable" homicide in which a person, who had been

¹ *Select Coroners' Rolls*, p. 50.

² 9 and 10 Vict. c. 62. The abolition was hastened by the fear of entire railway-trains being forfeited.

³ 8 and 9 Geo. IV. c. 31.

⁴ For he should *retreat*, if he can. Cf. p. 104 n. 1.

assaulted when entirely passive, slew his assailant in self-defence. On the other hand, if the chance-medley had been continued by *both* the combatants down to the time when the fatal blow was struck, the homicide would have nothing to "excuse" it, and would be felonious¹—a manslaughter or possibly even a murder.

(2) Where one man killed another by *misadventure*—*i.e.* in doing a lawful act, and with no intention of causing harm, and with no culpable negligence in the mode of doing it²—his act was held excusable. Thus where a man spun round with a boy in a frolic, and, on the boy disengaging himself, reeled against a woman and thereby caused her death, the case was held to be only one of misadventure³. So again, where a child of four, on being asked if he would like a drop of gin, twisted the glass out of the prisoner's hand and swallowed nearly all its contents, and died in consequence, it was held that the drinking this extraordinary additional quantity of the gin was the act of the child himself; and that the prisoner therefore had committed no felony⁴. A very important class of cases of mere misadventure is that in which death is accidentally caused by a parent or master, when engaged in the lawful act of giving a child, or scholar, or apprentice, reasonable chastisement with a reasonable instrument⁵.

The right of the parent or teacher to punish a child is recognised by the Children Act, 1908 (8 Edw. VII. c. 67, s. 37). By the older common law this right of correction was recognised even as against adult servants. Similarly, every husband was formerly intrusted with the power of correcting his wife by personal chastisement; but, as Blackstone (i. 444) tells us, in the politer days of Charles the Second this power

¹ *Infra*, p. 118.

² Contrast *Reg. v. Jones*, 12 Cox 628 (K. S. C. 28) with K. S. C. 27.

³ *Reg. v. Bruce*, 2 Cox 262 (K. S. C. 136).

⁴ *Rex v. Martin*, 3 C. and P. 211 (K. S. C. 137).

⁵ *Rex v. Woods*, 85 J. P. 272; *Cleary v. Booth*, L. R. [1893] 1 Q. B. 465. Cf. p. 155, n⁴ *infra*; and see 85 J. P. 272.

of correction began to be doubted; though, he adds in a vein of humour, "the lower rank of people, *who were always fond of the Common Law*, still claim and exert their antient privilege."

The right to punish a child exists of course only in the case of one who is old enough to be capable of appreciating correction; not, for instance, in that of an infant of the age of two and a half¹. And, in all cases, the character and amount of the punishment that can be recognised as lawful will vary with the age and the sex and the apparent physical condition of the child. But where the punishment has clearly a lawful occasion, and is not unreasonable in the manner of its infliction or even in its amount, the fact that the child has died in consequence of it will not render the parent or master who inflicted it guilty of a felonious homicide. Thus a death may ensue where the child has some hidden peculiarity of structure that was unknown² to the parent or master. Such a defect, for instance, as a fatty heart or the familiar "egg-shell skull" may render a slight blow fatal; or a hæmophilic boy may have such a tendency to bleeding that he dies from a flogging which might have been administered with impunity to ordinary pupils. Similarly, quite apart from any chastisement, the peculiar physical formation of a person may easily lead to his death by misadventure. A slight push, which was only such as is usual in social intercourse, has, for instance, been known to cause the death of an old man with the brittle arteries of senility.

Another class of cases of misadventure, of still greater practical importance, is seen where death is accidentally caused in the course of some lawful game or sport; as, for instance, when a batsman's head is fatally injured by a short-pitched ball rising sharply from the ground. Thus, though an armed tournament was unlawful even in mediæval times, and

¹ *Reg. v. Griffin*, 11 Cox 402.

² *Status lymphaticus* (the debility produced by enlargement of the thymus gland) can rarely be detected during life; yet the most trifling cause may prove sufficient to kill anyone who has this malady; see 85 J. P. 72.

a knight who killed another in such an exercise would usually be guilty of criminal homicide, yet it was otherwise if the King had commanded the particular tournament in question. In a struggle thus legalised by the royal order, the death of any of the combatants was regarded as a case of mere innocent misadventure. At the present day, all such exercises with naked swords would be illegal however licensed. But ordinary fencing, and, similarly, boxing¹, wrestling, football², and the like, are lawful games if carried on with due care. Everyone who takes part in them gives, by so doing, his implied consent to the infliction upon himself of a certain (though a limited) amount of bodily harm. But no one has the right to consent to the infliction upon himself of an excessive degree of bodily harm, *e.g.* such harm as amounts to "maiming"³ him; and thus his agreement to play a game under dangerously illegal rules will, if he be killed in the course of the game, afford no legal excuse to the killer⁴. (Nor has he even any right to consent to the production of such a state of affairs as will constitute a breach of the peace. For both these reasons, prize-fighting⁵ is held to be illegal; in spite of the two competitors having consented to take its risk.)

Thus not only is a *combat* illegal, produced by an actual desire to hurt, but so also is even a *contest* for mere exhibition of strength and skill, if they are exhibited in a manner that is perilous⁶. To wear boxing-gloves will not necessarily reduce the peril of boxing to within the legal limit, for they may be

¹ *Reg. v. Coney*, L. R. 8 Q. B. D. 534.

² *Reg. v. Bradshaw*, 14 Cox 83 (K. S. C. 131).

³ *Infra*, p. 146.

⁴ Cf. p. 86 as to guilt of the spectators.

⁵ The fact that the boxers are contesting for a wager does not necessarily constitute a Prize-fight. That term involves the further idea of a Battery (p. 152) with a *dangerous* weapon, viz. the fist of a trained boxer; and usually, moreover, the idea of Publicity, so that there also is an Affray (p. 152 n.), and an Unlawful Assembly (p. 282).

⁶ As by the blow on the kidneys, now forbidden by the National Sporting Club. Doubts exist as to the legality of that knock-out blow on the jaw (Tom Sayers' "auctioneer"), which drives it upwards and so causes concussion of the brain.

too slight for their purpose¹. And the question has further been debated whether an illegal degree of peril is not created by the Ten Seconds Rule; which, in order to protect an over-exhausted man from resuming the fight, makes his non-resumption of the contest equivalent to a defeat, but thereby tempts each boxer to try to secure victory by reducing his opponent to a dangerously extreme degree of exhaustion. The Home Secretary stated in 1925 that an average of five persons are annually killed in boxing.

Of course even the most lawful game will cease to be lawful as soon as anger is imported into it; and the immunity from criminal liability will consequently at once disappear².

¹ Or the fight may be unduly prolonged; C. C. C. Sess. Pap. LXIV. 73.

² *Reg. v. Canniff*, 9 C. and P. 359. The fact that the prisoner was playing in strict accordance with the well-accustomed rules of the game will help towards shewing that he was not actuated by anger; and, again, towards shewing that the way in which he was playing was not so obviously perilous as to be illegal. Hence, for either of these purposes, these rules may be admissible evidence on behalf of the prisoner. But, on the other hand, if the prisoner was playing in violation of the rules, they are not thereby rendered admissible evidence against him. For it is not criminal, and not necessarily either dangerous or malicious, to break them. On this point the case of *Reg. v. Bradshaw* (*supra*, p. 110) may be compared with that of *Reg. v. Moore* (14 T. L. R. 229), where, in a game of Association football, the prisoner had killed a man by charging him from behind, in defiance of the rules.

CHAPTER IX

FELONIOUS HOMICIDES

IF a homicide be committed under such circumstances as to be neither justifiable nor excusable, but a crime, it is not, and never was, a mere misdemeanor, but always a felony. The felony may, however, take any one of four forms:

(I) *Felonia de se*; i.e. a suicide that takes place under such conditions as to be criminal. It is generally said that no one can be—and in actual practice no one ever is—adjudged a *felo*¹ *de se* unless he brought about his own death with the same full “malice aforethought” (*infra*, p. 139) that would render his killing of someone else a Murder; e.g. where a duellist was killed by the bursting of his own pistol².

The common law endeavoured to deter men from this crime by the threat of degradations to be inflicted upon the suicide's corpse, which, by a natural if unreasoning association of ideas, were often a potent deterrent; and also by threatening the forfeiture of his goods, a vicarious punishment which, though falling wholly upon his surviving family, was likely often to appeal strongly to his sense of affection. Thus the man who feloniously took his own life was at one time buried in the highway, with a stake through his body; and his goods were forfeited. The burial of suicides lost its gruesome aspect in 1824, when the original mode was replaced by the practice of burial between the hours of nine and twelve at night, without any service. In 1870, the confiscation of the goods of suicides was put an end to in the general abolition of forfeitures for felony³. And in 1882, the statute 45 and 46 Vict. c. 19 removed every penalty, except the purely ecclesi-

¹ *Felo de se* does not mean the felony, but the felon himself.

² But, more logically, Jervis (*Coroners*, 6th ed. p. 151) holds it sufficient that the suicide has committed “any unlawful act the consequence of which is his own death,” as in Manslaughter. And the form of verdict prescribed in the Coroners Act (50 and 51 Vict. c. 71, s. 2) requires only a killing “feloniously,” not any malice aforethought.

³ 33 and 34 Vict. c. 23.

astical one that the interment must not be solemnised by a burial service in the full ordinary Anglican form. Even before the common law penalties of *felonía de se* were legally abolished, the popular disapprobation of them, which ultimately secured their abolition, had gone very far in reducing the number of cases in which they were actually inflicted. For it rendered coroners' juries eager to avail themselves of the slightest grounds for pronouncing an act of suicide to have been committed during a fit of insanity, and consequently to have involved no felonious guilt. So if the evidence disclosed any source of anxiety which might have given the deceased a motive for his fatal act, anxiety was declared to have unsettled his mind; if, on the other hand, no motive could be found, then the very causelessness of his act was declared to be itself proof of his insanity. It is to be regretted that this practice of "pious perjury"—to borrow an indulgent phrase of Blackstone's—became so inveterate that it has survived the abolition of those penalties which were its cause and its excuse. In every thousand cases of suicide upon which coroners' inquests are held, there are usually less than forty in which a verdict of *felo de se* is returned¹. Juries who, in cases of suicide, pronounce on utterly inadequate grounds a verdict of Insanity², forget that such a verdict, whilst it no longer removes any appreciable penalty, may, on the other hand, throw upon the family of the deceased an undeserved stigma, gravely affecting their social or matrimonial or commercial prospects. For the same progress of thought which has made men averse to vicarious and to degrading punishments, has also made them quick to trace the physical and mental influences of heredity.

¹ In the seventeenth century, on the other hand, it was returned in over ninety per cent. of the cases. In France only sixteen per cent. of suicides are pronounced insane, unlike our more than ninety-six. A London coroner (*The Times*, Dec. 18, 1908) calculated that only thirty per cent. of suicides were really insane.

² In 1925 a London coroner pressed for a verdict of Insanity, though saying frankly, "There is not the slightest fact to shew an unsound mind." The jury refused to give the sham verdict.

In spite of the abolition of the old penalties, the intentional suicide of a sane person is still regarded by the law as an act of crime. Accordingly, every attempt to commit suicide is an indictable misdemeanor¹. Another consequence of the criminality of suicide is that if two persons agree to die together, but only one succeeds in putting an end to his life, the survivor is guilty of murder²; as a principal if present, or, if absent, as an accessory before the fact³. Putting it more generally, anyone who successfully instigates another to commit suicide is guilty of murder. For the same reason, if a person, in making an attempt to commit suicide, should accidentally kill any of the bystanders, he will be guilty at least of manslaughter, and, in most cases, of murder⁴.

Statistics shew that during the fifty years preceding the War the proportion of suicides to population went on increasing; but during the War it fell steadily. It is, however, higher now (1925), by a fifteenth, than before the War⁵.

We now pass to those cases of felonious killing in which the person slain is not the slayer himself but someone else.

(II) *Manslaughter*. This felony consists in killing another person unlawfully, yet under conditions not so heinous as to render the act a murder⁶. It is spoken of by Hale and Blackstone as being committed "without malice, either express or implied." We shall better avoid confusion of language if we say, instead, "without any of those⁷ *more guilty* forms of malice which amount to Murderous Malice." For malice, in

¹ *Vide supra*, p. 83. *Reg. v. Burgess*, L. and C. 258.

² *Commonwealth v. Bowen*, 13 Mass. 356 (K. S. C. 91).

³ Yet, in these "death-pacts," the sentence is always commuted now.

⁴ *Commonwealth v. Mink*, 9 Lathrop 422 (K. S. C. 110); *Rex v. Hopwood*, 8 Cr. App. R. 143.

⁵ In France it is very much higher than in Great Britain. In both England and France, summer and not winter is the period of the maximum of suicides; and in both countries they are about thrice as common among men as among women.

⁶ But originally, and even so late as 1581, "manslaughter" was a generic name that included *all* forms of felonious homicide. See Holdsworth's *Hist. Eng. Law*, III. 314.

⁷ *Infra*, p. 134.

its widest legal sense (that is to say, *mens rea*), is essential to every crime.

Manslaughter admits of subdivision into two sharply distinguished forms; the so-called "voluntary" and the so-called "involuntary."

(a) *Voluntary* manslaughter is that which is committed with the "voluntas," the intention, of causing to another person some illegal harm—it may be a merely slight or a grave or even a fatal harm. Where some trivial blow is struck, with the intention of producing mere momentary pain, but death unexpectedly results from it, then, if it is an unlawful blow, the striker will be guilty of manslaughter. (We have already seen, p. 108, *supra*, that this merely accidental homicide would not have been criminal at all if the blow had been a lawful one, as in correcting a scholar.) An illustration of such a manslaughter is afforded when the carrying out of some slight practical joke, which seemed harmless enough, unhappily results, perhaps through blood-poisoning, in the death of the victim of it¹.

Where, however, death is produced by a blow which was not a mere trivial one, but was likely to cause serious bodily harm, the crime may be either a manslaughter or a murder, according to the circumstances. For though, if the assailant had received only a slight provocation, or none at all, his crime will amount to murder; yet if he had received gross² provocation, and had been *in fact* provoked by it, it may amount to no more than a manslaughter. This may be the case even though the fatal injury were inflicted by a deadly weapon and with the full intention of killing. For the provocation which the slayer had received may have been so sudden and so extreme as actually to deprive him (for the

¹ *Rex v. Sullivan*, 7 C. and P. 641 (K. S. C. 116).

² *Reg. v. Wild*, 2 Lewin 214 (K. S. C. 116). The "grossness" must be measured by an ordinary person's feelings, not by this prisoner's exceptional sensitiveness (*Rex v. Alexander*, 9 Cr. App. R. 139; cf. *ibid.* p. 93). Were it measured by the latter, mere spoken words or even silent gestures might sometimes be adequate provocation.

time being) of the ordinary powers of self-control¹; and consequently to render his violent feelings of hostility less blameable—blameable enough, still, to merit punishment, but not to merit the punishment of death. The suddenness of the homicidal act is thus an essential condition of this mitigation of his guilt. A settled habitual feeling of irritation cannot reduce a murder to a manslaughter. The fact that the weapon used was one which the slayer already had in his hand at the time of receiving the provocation, may be important as evidence that the blow was not premeditated. Still more favourable will it be for the prisoner if he can shew that he used no weapon but that with which nature had provided him—his own clenched fist. If *A*, firing at *B* under such provocation as would reduce to manslaughter his killing of *B*, miss his aim and instead kill *C*, this unintended crime will also be only a manslaughter.

In manslaughter of the “voluntary” kind, as there can have been no premeditation, there can never be an accessory before the fact (a remark which has sometimes been extended, too hastily, to manslaughters in general). There will usually, too, be no appreciable interval of time between the one man’s act of provocation and the other man’s act of killing. If, however, some time do intervene it is possible that the slayer’s conduct during it may be such as to shew that the ungovernable passion, aroused by the provocation, still continued throughout that time and was truly the cause of the fatal blow. On the other hand, it is of course also possible that his conduct during the interval—even one of a few minutes—may have been so calm as to shew that his resentment had cooled down; and consequently that the provocation originally received will not have the legal effect of reducing the killing to something less than murder.

The provocation upon which any such sudden intent to kill is formed must, as we have said, be a gross one, if it is

¹ *Rex v. Lynch*, 5 C. and P. 324. Cf. the mental condition in the new offence of Infanticide, p. 125 *infra*.

to have the result of reducing the killing to a manslaughter. Mere words, however insulting and irritating, are never regarded by the law as gross enough to produce this result. Indeed very few forms of provocation that do not involve some physical assault are regarded as sufficiently gross to produce it. One of those few may be found in the case of a husband who detects a man in the very act of adultery with his wife¹, and kills him² on the spot. (But had the man been committing not mere adultery but rape—*i.e.* had the wife not been a consenting party—the husband's act in killing him might not have had even the guilt of manslaughter and might have been a Justifiable Homicide.) On the other hand, if he kill him, not on the spot but subsequently, "after cooling-time," it will be Murder.

Even an actual assault is not provocation enough unless it be of a very violent or very insulting³ character. Thus if a man receives from a woman a slap in the face, the provocation is not gross enough for this purpose; though if she had struck him violently on the face with a heavy clog, so as to draw blood, that would have been sufficiently gross⁴. And a blow which was given lawfully, *e.g.* for the purpose of preventing a violent assault on some third person, can never be an adequate provocation. Although, as we have seen, mere words, however insulting, are never regarded as amounting of themselves to a sufficiently gross provocation, yet, where they accompany a blow, they may be taken into account in estimating the degree of provocation given by the blow. They may thus have the effect of rendering an assault, which, if

¹ Not with a mere fiancée, *Rex v. Palmer*, L. R. [1913] 2 K. B. 29; nor a concubine, *Rex v. Greening*, 9 Cr. App. R. 105.

² Or kills her. Cf. *Rex v. Maddy*, 1 Ventris 158 (K. S. C. 111). And so with a confession of *past* adultery, if the words used would cause in an ordinary man the same hostility as if he had witnessed his wife's act of adultery; *Rex v. Palmer*, *supra*. But no less convincing proof of adultery suffices; *Rex v. Birchall*, 29 T. L. R. 711, cf. p. 732. Nor does a wife's confession of intention to commit adultery; *Rex v. Ellor* (*The Times*, July 26, 1920).

³ As to spitting on a person, cf. 4 F. and F. 1066 with 8 Cr. App. R. 121.

⁴ Foster 292.

committed silently, would have been trivial, a provocation gross enough to reduce a homicide into a manslaughter. An unlawful imprisonment, or an unlawful arrest, may clearly be a sufficient provocation to reduce to manslaughter an act of killing inflicted by the actual person imprisoned or arrested¹. But it will never have this effect as regards a homicide committed by other persons in their sympathy with him. Hence if bystanders try to rescue him, and kill someone in the attempt to do so, they will be guilty of murder². Again, there must be a reasonable proportion between the provocation and the violence provoked by it. A kick that would extenuate the return of a fatal blow might not extenuate the fatal use of a pistol.

One of the most common cases of voluntary manslaughter is that of its being committed in the anger provoked by a sudden combat. Thus if, upon a quarrel which was not premeditated on the part of the prisoner, persons fall to fighting, and then, in the heat of the moment, either of them (for the combat affords matter of provocation to each) inflicts some fatal injury on the other, the slayer will not be guilty of more than a manslaughter. So where a soldier, who was defending himself against an insulting mob by brandishing his sword and by striking some of them with the side of it, finally struck one of them a blow on the head which killed him, the judges held it only manslaughter³. Similarly where, in a quarrel, one man threw another to the ground, and then stamped on his stomach and so killed him, it was held to be only manslaughter; as there had been no interval of time between the blow which threw the deceased person down and the stamping on his body⁴. If, however, the quarrel subside for a time, and then be resumed by one of the combatants, it usually will not afford him any palliation for a fatal blow struck after this

¹ See p. 449 *infra*. But the communication of venereal disease by a concubine is *not* sufficient. *Per* Avory, J. (*The Times*, March 6, 1918).

² *Reg. v. Allen*, Stephen's *Dig. Cr. Law*, Art. 245 and note 9.

³ *Rex v. Brown*, 1 Leach 176 (K. S. C. 112).

⁴ *Rex v. Ayes*, Russell and Ryan (K. S. C. 113).

resumption of the conflict. It certainly will not do so if he employed the interval in arming himself for the renewal of the combat. Hence if, when two persons quarrel, they proceed to fight then and there, and one of them is killed, the offence is only manslaughter; but if, instead of thus fighting at the moment of the quarrel, they agree to hold a duel on the following day, and one of them is killed in that duel, the slayer will be guilty of murder¹.

The various effects of provocation in cases of "voluntary" homicide may be summed up thus. A grave provocation reduces to manslaughter the act of killing, even though it be committed with some dangerous instrument, such as was likely to kill (*e.g.* a pestle). But a slight provocation (α) leaves the act of killing with a dangerous instrument still a murder; though it (β) reduces the act of killing with a slight instrument, such as was likely only to wound (*e.g.* a cudgel), to manslaughter. Provocation never reduces a homicide to misadventure, if the fatal blow were unlawful (*e.g.* resentful); though it may if that blow were only a lawful act of self-defence.

(b) *Involuntary* manslaughter is that which is committed by a person who brings about the death of another by acting in some unlawful manner, but without any intention of killing, or even of hurting, anyone. This may happen in three ways:

(1) He may be doing some act which is intrinsically unlawful (probably it must not² be so unlawful as to be a felony, for then the homicide might not be a mere manslaughter but a murder). Thus a person commits manslaughter if he accidentally kills³ some one else by conduct which amounts to a

¹ *Reg. v. Cuddy*, 1 C. and K. 210.

² *Infra* p. 138.

³ Even though a fatal result were so improbable that it could not be anticipated. In *Rex v. Sasun* (*The Times*, May 18, 1920), a man was convicted of manslaughter who, in commencing an illegal operation upon a woman, had caused her death, through nervous shock, by an act so slight that three experienced accoucheurs stated that they had never known it produce death. But Shearman, J., ruled that "*However improbable a fatal result might be, if the illegal act did cause death there is a manslaughter.*" Cf. 21 Cox 693; 85 J. P. 276; and, for Torts, *In re Polemis*, L. R. [1921] 3 K. B. 560.

misdeemeanor (as by taking part in an unlawful assembly), or even to a petty offence punishable summarily (as where a motorist exceeds the appointed limit of speed). And this rule has been regarded as holding good whenever the unlawful act which accidentally produced the death amounted to even a mere civil tort. But there is some modern authority for confining the doctrine to such torts as are likely to cause bodily hurt. In *Reg. v. Franklin*¹, this more lenient view was expressed by Field, J., and Mathew, J. But the late Mr Justice Stephen² adhered to the older doctrine that any tort will suffice, even though it did not seem fraught with any danger³.

(2) He may be leaving unperformed some act which it is his legal duty to perform. Thus if a railway passenger is killed because the pointsman fell asleep and forgot to move the points, this pointsman will be guilty of manslaughter (if, on the other hand, he had purposely left the points unmoved, it would have been murder). Where the engine-man at a colliery left his steam-engine in the charge of an ignorant boy, and this lad's inexperience brought about the death of a miner, the engine-man was held guilty of manslaughter⁴. But the connexion between the omission and the fatal result must not be too remote⁵.

In these two instances, the legal duty of acting arises from special circumstances whereby the particular person concerned had taken it upon himself⁶. It will usually arise thus;

¹ 15 Cox 163 (K. S. C. 118).

² *Dig. Cr. Law*, 7th ed. Art. 314.

³ Mothers frequently take their babies into bed with themselves; but at much risk of suffocating them by "overlying," since children so young will not automatically struggle and so awake the overlayer. Yet such a homicide is not held to be a Manslaughter unless the overlayer were drunk. Cf. 3 Cr. App. R. 187 and 23 Victoria L. R. 159. Even if she be drunk the Children Act, 1908, s. 13, allows the alternative of dealing with it as only an act of Criminal Neglect, punishable with two years' imprisonment.

⁴ *Reg. v. Lowe*, 3 C. and K. 123 (K. S. C. 132).

⁵ See *Reg. v. Hilton*, 2 Lewin 214 (K. S. C. 133); *Reg. v. Rees*, C. C. C. Sessions Papers, CIV. (K. S. C. 133).

⁶ Even a duty created only by a contract (*e.g.* signalman's hiring) to which the person killed was not a party, may suffice; at any rate if it con-

for the community at large are seldom under any legal duties but negative ones, duties to abstain from the commission of certain acts. I am under no legal obligation to protect a stranger. "If I saw a man, who was not under my charge, taking up a tumbler of poison, I should not become guilty of any crime by not stopping him¹." Nor by not warning a blind man whom I see heading for the edge of a cliff. (Cf. p. 9, *supra*.) But the law itself does in some cases impose upon a special class of persons some duty of a positive character, a duty of acting. Thus parents are responsible for the care of their children²; and consequently, if a child's death is caused, or even accelerated, by a parent's gross neglect in not providing sufficient food or clothing for his child, the parent will be guilty of manslaughter.

The mere fact that there was some degree of negligence on the parent's part will not suffice. There must be a "wicked" negligence, a negligence so great as to satisfy a jury that the prisoner did not care whether the child died or not. Of course, if the wickedness went so far that the parent *intended* the child to starve to death, or even to suffer grievous bodily harm, he would be guilty not of manslaughter but of murder (13 Cr. App. R. 184). At common law, it was a good defence that the parent was not sufficiently well off to provide for the child. But now, under the Children Act, 1908—8 Edw. VII. c. 67, s. 12 (1)—neglect to provide food, clothing, medical aid, or lodging for a child is not excused by the being unable to do so without resorting to the Poor Law authorities. Hence if his wilful omission to provide medical aid for his child occasions or accelerates the death of the child, the parent will be guilty of manslaughter. (And this will be the templated the safety of life. See 11 Cox 210, 16 Cox 710, 19 T. L. R. 37. Yet see Bevan on Negligence, p. 8. The common law bound the captain of a British ship to try to rescue any of *his own* sailors or passengers who fell overboard. But the Maritime Conventions Act, 1911, s. 6, extends his duty to the rescue of *any* person at sea in danger of being lost, even an alien enemy.

¹ *Per* Hawkins, J., in *Reg. v. Paine* (*The Times*, Feb. 25, 1880).

² From the birth, but not before; *Rex v. Izod*, 20 Cox 690.

case even when the omission is due to a conscientious or religious objection to the use of medicine¹.) This liability for neglect is not confined to parents. Any adult who undertakes, lawfully or unlawfully, the care of a person who is helpless, whether it be through infancy or even through mere infirmity², will similarly be guilty of manslaughter if this person should die through his *wicked* neglect; or even of murder, if he knew that the neglect was likely to prove fatal. And, on the same principle, if a doctor, after having (not merely been summoned to, but) actually undertaken the treatment of a patient, wickedly neglects him, and he dies in consequence of this neglect, the doctor will be guilty of manslaughter.

But the degree of negligence must be not merely a culpable but a criminal one. It is not enough to shew that there was an error of judgment, or even such carelessness as would support a civil action for damages for negligence³. Hence it has been noticed that when motorists are sued in civil actions for negligence, the verdict is usually against them, but is rarely so in prosecutions of them for manslaughter. There must be a "wicked" negligence⁴—"such disregard for the life and safety of others as to deserve Punishment" (19 Cr. App. R. 8). Yet the delicate line between these degrees has to be drawn by the jury⁵, not by the judge (unless he hold that there

¹ *Reg. v. Senior*, L. R. [1899] 1 Q. B. 283.

² *Reg. v. Instan*, L. R. [1893] 1 Q. B. 450; cf. 17 Cr. App. R. 7.

³ French law drew until 1912 the like distinction; but now identifies criminal negligence with civil.

⁴ *Reg. v. Finney*, 12 Cox 625 (K. S. C. 120).

⁵ Yet it cannot be drawn in abstract terms. But it may be illustrated by contrasts. Motorists have been allowed to be convicted for homicides caused by coming round a dangerous corner on the wrong side and without sounding the horn; or by driving at a rate of sixteen miles an hour down Oxford Street at ten a.m. (C. C. C. Sess. Pap. CXLVII. 677), or at twenty-five miles an hour on a country road that was slippery with ice (CLII. 340); or by steering out on the wrong side, to pass a tramcar that stood lengthways across the motorist's course (CLVIII. 33). And so has a drunken van-driver who took his horses "galloping like a fire-engine" along the wrong side of the road (CLIV. 386). But it was held by Ridley, J., to be no manslaughter where the negligence by which a motorist caused a death was only that of

is *no* evidence at all to shew the criminal degree). (Yet however extreme a man's negligence may have been, he still will not be answerable for a death which even full diligence on his part would not have averted or delayed¹.) On the other hand, "contributory negligence" (see p. 129, *infra*) is not a defence in criminal trials, whilst in civil ones it is accepted; as where a flurried pedestrian stops short in front of a taxicab.

(3) He may be doing some act which is quite lawful, but nevertheless may be doing it negligently² and therefore unlawfully. For instance, a sportsman indulges in rifle practice in the immediate vicinity of houses; a school-girl reads her favourite poet whilst cycling; or some one swings a chair to and fro wantonly, though in mere play³. If death be caused in chastising a child who is under your authority, and whom you have no intention to kill, the case will be (a) one of *Manslaughter*, if the extent of the punishment were unreasonable, although the instrument used was a reasonable one. On the other hand, it will be (b) one of *Misadventure*, if both the extent and the instrument were reasonable; but (c) of *Murder*, if the instrument used was utterly unreasonable.

getting out of the line of traffic and-proceeding on the wrong side (CXLIX. 314); or that of an error of judgment in continuing his journey after finding that his steering-gear had got out of order (CXLIX. 232). The well-known case of *Dixon v. Bell* (5 M. and S. 198, *Kenny's Cases on Tort*, p. 587) is so close to the dividing-line that authorities are disagreed as to whether or not the negligence shewn in it would be sufficient for Manslaughter.

¹ *Reg. v. Dalloway*, 2 Cox 273 (K. S. C. 134).

² *I.e.* with a *wicked* negligence. See Note 5, p. 122 *supra*. As to the Evidence necessary, it has been held in Ireland (*Rex v. Cavendish*, 8 Ir. C. L. 178) and approved by the High Court of Australia (27 C. L. R. 160) that, on an indictment for manslaughter by negligent driving, the proof of the mere fact of killing raises a presumption of unlawful killing, and thus throws on the accused the burden of disproving negligence (cf. 16 Cox 710; and the kindred rule in Murder, *infra*, p. 140). But this Irish ruling has not escaped criticism. That a motor-car was on the foot-path would be evidence of criminal negligence. But it would be rebutted by shewing that it went there by the machinery being out of order; or by the need of avoiding an imminent collision on the roadway; or even merely by (in the Admiralty phrase) "a wrong manœuvring in the agony of the moment" of impending collision.

³ Or a motorist drives at a rate which, though within the prescribed speed limit (contrast p. 120 *supra*), is too rapid for the corner he is turning.

And similarly if death be caused by a workman throwing down rubbish from a roof, though without his having any idea of doing hurt to anyone, there are the same three alternatives. For (a) it will be *Misadventure*, if the matter occurs in a village, and the workman has called out to give warning before throwing the materials down. But (b) it will be *Manslaughter*, (1) if, though it were only in a village, the workman did not even call out; or (2) if it were in a town and he only called out, but did not take the further precaution of looking over. Finally, (c) it will be *Murder*, if it were in a town, and he so recklessly negligent as not even to call out¹. In like manner, if a person die from being plied with liquor by his boon-companions, the degree of their legal responsibility will depend upon the motives with which they acted. If from mere unreflecting conviviality, the homicide would only be one of misadventure; if from a deliberate "practical joke," it would be² at least a manslaughter; and, in case that an extremely excessive amount of liquor was administered, or that there was a desire to produce death³, it would be murder⁴. A person may be criminally negligent although taking all the care that *he* can. For if he undertake the work of an expert—e.g. if a ploughman act as a boatman or as a surgeon—he must exercise an expert's skill (cf. 12 Cr. App. R. 153).

Manslaughter is often spoken of as "the most elastic of crimes"; for the degrees of guilt which may accompany it extend from the verge of murder to the verge of excusable homicide. The punishment⁵ is penal servitude for life or not less than three years, or imprisonment for not more than two, or a fine⁶. Coroners' inquests suggest an annual average for

¹ Archbold, p. 890. ² *Rex v. Martin*, 3 C. and P. 211 (K. S. C. 137).

³ *Reg. v. Paine*, Sessions Papers, xci. 537–592; *The Times*, Feb. 25, 1880.

⁴ *Reg. v. Packard* (K. S. C. 137).

⁵ 24 and 25 Vict. c. 100, s. 5. The normal sentence for Involuntary manslaughter is reputed to be six months' imprisonment.

⁶ For manslaughter in a combat, Patteson, J., once inflicted merely a fine of a shilling (*The Times*, Aug. 9, 1845).

cases of manslaughter of a little under seventy, and for murders a little over one hundred and fifty; as against five justifiable homicides (other than executions) and nearly four thousand (sane and insane) suicides.

(III) Infanticide. This modern felony is the creation of the Infanticide Act, 1922 (12 and 13 Geo. 5. c. 18).

During the seventeen years 1905–21, sixty women were sentenced to death for infanticide; but in fifty-nine of the cases the sentence was commuted. To remove this divergence between theory and practice, the Act of 1922 enacts that: “Where a woman, by any wilful act or omission, causes the death of her newly-born child, but at the time...had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall...be guilty of Infanticide”; and may be punished as if guilty of Manslaughter (see p. 124, *supra*) although but for this enactment she would have been guilty of Murder. If she be tried for the child’s murder, the jury may instead convict her of Infanticide; and if tried for Infanticide, they may instead convict her either of Concealment of Birth (see p. 131), or (if she be over sixteen) of an offence of Cruelty under s. 12 of the Children Act, 1908.

Thus she is treated as having been in *some* degree responsible when she did the act, although the balance of her mind was then so far disturbed that—like a person who kills under gross provocation—she was not completely mistress of her faculties. In a bad case, where she did intend to kill, a sentence of nine months’ imprisonment was passed by Avory, J.

The Act unfortunately contains no definition of the vague phrase “*newly born*.” Accoucheurs limit it to infants less than sixteen days old (Glaister’s *Legal Medicine*, p. 133). But on the intention of the Act see the judgment in *Rex v. O’Donoghue*, (44 T.L.R. 51; 20 Cr. App. R., p. 132).

(IV) Murder. The word “murder,” from the Germanic *morth*, originally denoted (1) a secret killing. Hence the name was applied to the fines imposed by William the Conqueror

upon any hundred where a Norman was found secretly killed. The dead man was presumed to be a Norman unless there was express "presentment of Englishry." After these fines (then already nearly obsolete) were abolished by Edward III. in 1340, the word "murder" necessarily lost its earlier meaning, and came to be used as a name for (2) the worst kinds of homicide. (Those kinds of homicide which, as they were neither justifiable nor even cases of misfortune or self-defence, were capital felonies, but yet were not of so bad a kind as to be called "murders," remained undistinguished by any particular name.) Finally, when by 23 Hen. VIII. c. 1 the benefit of clergy was largely taken away from "murder of malice aforethought," the term "murder" soon became (3) limited, as it still is, to the form of homicide dealt with by this statute. This phrase "malice aforethought" was not new. It had been in use since the thirteenth century (even before the abolition of Englishry); for "*malitia praecogitata*" was familiar under Henry III. as one of the tests of unpardonable (*i.e.* capital) homicide. But at the time when the phrase began to be used the word "*malitia*" meant rather the wrongful act intended, than the intention itself; still less had it any particular reference to that special form of evil intention, *viz.* hatred, which "malice" now popularly denotes¹.

Murder, in this third and final sense, may be defined, in antique phraseology which has been classical ever since the time of Lord Coke, as (α) unlawfully (β) killing (γ) a reasonable creature, who is (δ) in being and (ϵ) under the King's peace, (ζ) with malice aforethought either express or implied; (η) the death following within a year and a day². Of these seven constituents, the first, *viz.* "unlawfulness," distinguishes murder from all non-felonious homicides, whether ranked as justifiable or only as excusable; and the sixth, "malice aforethought," distinguishes it from those unlawful homicides which rank only as manslaughter. The second, third, fourth,

¹ Pollock and Maitland, II. 467; Maitland's *Collected Papers*, I. 304.

² 3 Coke Inst. 47.

fifth and seventh are as necessary in manslaughter as in murder. But, as it is in cases of murder that they have received the fullest judicial consideration, it has seemed more appropriate to postpone until now our discussion of them. We will consider the last six points successively.

(1) *Killing*. In murder, as in manslaughter, a man may be held liable for a homicide which he effected, not by any direct violence, but only through some protracted chain of consequences; his own last act in it being remote, both in time and in order of causation, from the death which it brought about. This is vividly illustrated by two old cases mentioned by Blackstone. In one, a "harlot" abandoned her new-born child in an orchard, and covered it over with no better protection than leaves. Birds of prey being then common in England, a kite struck at the infant with its claws, and thereby inflicted wounds which caused the death of the child. The woman was arraigned of murder and executed¹. The other case is that of a son who took his sick father from one parish into a second one in cold weather, against the old man's will, and so hastened his death². Yet in murder, just as we saw in the case of Attempts³, there is a point at which the law refuses to continue to trace out chains of causation; and beyond which, therefore, any act is regarded as too remote to produce guilt⁴. But here, as before in Attempts, it is impossible to lay down any general rule for fixing this point; and the utmost that can be done is to

¹ Crompton's *Justice* 24 (K. S. C. 92). So, where a woman injured herself by jumping out of a window, through a well-grounded apprehension of being dangerously attacked by *C*, *C* was held to have caused the injury, though he never touched her; *Rex v. Coleman*, 84 J. P. 112.

² Y. B. 2 Ed. III. f. 34, Hil. pl. 1 (K. S. C. 92).

³ *Supra*, p. 81. Under Edward II a judge who, by an illegal sentence, had hanged a man, was only *fined*; Bracton's N. B., case 67.

⁴ See L. and C. 161. At the Cambridge assizes in 1667 Robert Dickman, B.A., of Sidney, was indicted for the manslaughter of Nicholas Christmas, a scholar of St John's; whom he beat for throwing stones at an apricot-tree, and who then, in running away, fell and was killed by the fall. But Sir T. Selater, whose MS. notebook records it, does not say what was ruled as to the remoteness of the beating.

suggest it approximately by illustrative instances. The most noteworthy is the rule that killing a man by perjury is not murder¹. That rule, though it has been doubted by some lawyers, has the sanction of so great a criminal judge as Sir Michael Foster²; and is supported by the fact that, even in an age when the definition of murder was less narrowly construed than now, and when judges were more pliant to the Crown, the lawyers of James II. did not venture to indict Titus Oates, the inventor of the imaginary "Popish Plot," for the murder of the men whose lives he had sworn away. Yet their desire to see him expiate his guilt by death, if it were legally possible, is sufficiently evidenced by the sentence passed (and executed) upon him when he was prosecuted for perjury—viz. two floggings of about two thousand lashes each. It used, again, formerly to be thought that killing by a *mental* shock would not be murder; but, in the clearer light of modern medical science, such a cause of death is no longer considered too remote for the law to trace³.

An act may amount to an unlawful killing, either as a murder or a manslaughter, even though it be so remote in the chain of causes that it would not have produced death but for the subsequent acts or omissions of third parties⁴; unless this conduct of the third parties were either wilful or, at least, unreasonably negligent. The rule extends even to similar intervening conduct on the part of the deceased victim himself⁵; e.g. his refusal to submit to amputation. The rationale of it is, that a person who brought the deceased

¹ *Rex v. Macdaniel*, Leach 52 (K. S. C. 97). But the Roman jurists treated such a perjurer as a murderer; *Dig.* 48. 8. 1. In England, killing by Witchcraft was not murder; though made capital in 1562.

² Foster's *Crown Law*, 130.

³ *Rex v. Hayward*, 21 Cox 693; *Reg. v. Towers*, 12 Cox 530; *Wilkinson v. Downton*, L. R. [1897] 2 Q. B. 57.

⁴ Contrast *Reg. v. Hilton*, 2 Lewin 214 (K. S. C. 133), with *Reg. v. Lowe*, 3 C. and K. 123 (K. S. C. 132).

⁵ Contrast *Reg. v. Holland*, 2 M. and R. 351 (K. S. C. 93) with *Reg. v. Sawyer*, C. C. C. Sessions Papers, cvi. (K. S. C. 94). In Scottish law, the corresponding rule does not thus include the conduct of the deceased or the mere omissions of third parties.

man into some new hazard of death may fairly be held responsible if any extraneous circumstances (that were not intrinsically improbable), *e.g.* septic poisoning, should convert that hazard into a certainty. An illustration, noteworthy both for the rank of the criminal and also because nearly twenty years elapsed between his crime and his trial, may be found in the case of Governor Wall¹. He was tried and executed, in 1802, for the murder of Serjeant Armstrong, on the island of Goree, by sentencing him to an illegal flogging; though the illness thus caused might not have produced death, but for Armstrong's own rash act in drinking spirits whilst he was ill².

It was held by Baron Martin³ that if an engine-driver negligently causes a collision, and a passenger, on seeing this collision to be imminent, jumps out of the train and is killed by the jump, the liability of the engine-driver for the manslaughter of this passenger will depend on the question whether a man of ordinary self-control would have thus jumped, or only a man unreasonably timid. In like manner, Quain, J., held that if a man who lay drunk in the middle of a road, and did not get out of the way of a vehicle, were driven over by it and killed, the driver would be indictable. For "contributory negligence" is no defence in criminal law⁴.

(2) *A reasonable creature.* Here "reasonable" does not mean "sane" but "human." In criminal law a lunatic is a *persona* for all purposes of protection, even when not so for those of liability.

(3) *In being, i.e.* not a mere unborn child⁵. There can be

¹ 28 State Trials, 51. See *All the year round*, Vol. ix.

² Cf. *Reg. v. Holland*, 2 M. and R. 351 (K. S. C. 93); and a like case in C. C. C. Sess. Pap., LXXVI. 259.

³ *Reg. v. Monks*, C. C. C. Sessions Papers (1870), LXXII. 424.

⁴ C. C. C. Sess. Pap., LXXVII. 354. See *Reg. v. Dant*, L. and C. 567 (K. S. C. 126) *per* Blackburn, J.; *Reg. v. Kew*, 12 Cox 455 (K. S. C. 135) *per* Byles, J.; *Reg. v. Swindall*, 2 C. and K. 230 (K. S. C. 74) *per* Pollock, C. B. But it may mitigate the sentence; *Rex v. Stubbs*, 8 Cr. App. R. 238.

⁵ For to early forensic medicine (A.D. 1348) it seemed "hard to know if he did kill it"; Statham, *Corone* 91.

no murder¹ of a child which dies before being born or even whilst being born; only of one that has been born, and, moreover, born alive. For purposes of criminal law—and also for those of property law, *e.g.* to become a holder of property and so transmit it again to new heirs, or to enable the father to obtain curtesy of his wife's lands—mere *birth* consists in extrusion from the mother's body, *i.e.* in having "come into the world." To the discredit of our law, a great encouragement to infanticide is afforded by the rule that *partial* extrusion is not sufficient. If but a foot be unextricated, there can be no murder; the extrusion must be complete, the whole body of the infant must have been brought into the world². But it is not necessary that the umbilical cord should have been severed³. And to be born *alive* the child must have been still in a living state after it had wholly quitted the body of the mother. Hence that life then still existed must be actually proved⁴, and this may be done by giving evidence of any cry, or breathing, or pulsation, or movement, after extrusion. But it is not necessary that the child should have continued to live until it was severed from the mother; or even until it could breathe⁵, for a child may perhaps not breathe until some time after full extrusion (though, on the other hand, infants sometimes breathe, and even cry, before they are fully extricated). A Parliamentary Committee of 1898 recorded the sapient verdict of a coroner's jury upon "a

¹ But by statute (24 and 25 Vict. c. 100, s. 58) to use means to procure abortion is a felony and punishable with penal servitude for life.

² *Rex v. Poulton* (1832), 5 C. and P. 330. Not so in India.

³ *Reg. v. Reeves*, 9 C. and P. 25. The ambiguous phrases, "separate existence" and "independent circulation," differently understood by different doctors, should be avoided, as more easily uttered than explained; (*L. Q. R.* xx. 142-5).

⁴ As to the frequent difficulty of this proof see p. 342 *infra*.

⁵ Nor is it necessary that it should be capable of *continued* life. In 1812, at York summer assizes, a midwife was convicted of murder for drowning a newborn child which, from the absence of part of the skull, could not have lived many hours. (Bayley, J., however, recommended commutation of her sentence, because she had sincerely believed her act to be lawful.) *Annual Register* for 1812, p. 96.

child found dead, *aged about three months*; but no evidence as to whether or not it had been born alive."

The birth must thus precede the death; but it need not also precede the injury. Thus an act which causes a child to be born much earlier than in the natural course, so that the child is rendered much less capable of living when born and accordingly soon dies, may itself amount to murder.

It may be convenient here to digress for a moment from murder to another offence; and to mention that on the indictment of any person (whether the mother or not) for the murder of a new-born infant, the jury may find no sufficient proof of murder, and yet may find proof of the statutory offence of "endeavouring, *by secret disposition*¹ of its dead² body, to conceal its birth" (24 and 25 Vict. c. 100, s. 60). In this crime, unlike murder, it is immaterial whether the child was born *alive* or not. In such cases the jury are permitted by the statute to convict of this offence of Concealment of Birth, without the delay of any fresh trial or fresh indictment. This statutory offence³ (which, of course, may itself form the subject-matter of an express indictment) is a misdemeanor; and is punishable by two years' imprisonment, with hard labour. Concealment from the world in general must be intended; it is no crime to conceal a birth merely from some particular individual alone; "there would be a hardship in punishing a girl for concealment from her master, if there had been no concealment from her mother⁴." But there may be sufficient concealment although the birth is already made known to some persons pledged to secrecy.

(4) *Under the King's peace.* "The King's majesty is, by his office and dignity royal, the principal conservator of the

¹ *E.g.* throwing into a pond, or burning. Thus mere *denial* is not a sufficient concealment.

² There thus is no offence in concealing the birth of a child that is still alive.

³ "An imaginary crime, consistent with perfect [moral] innocence"; Pollock, B. (*Life of Lord Bramwell*, p. 37). "I always regarded its moral guilt as altogether unworthy of punishment"; Lord Brampton (*Reminiscences*, ch. xxxii.).

⁴ Mr Justice Wright, *Draft Criminal Code for Jamaica*, p. 108.

peace within all his dominions¹." Yet in our Anglo-Saxon period the King's peace was only partial in its operation, and merely supplemented that national peace which it finally supplanted. The national peace, which apparently had its origin in the sanctity of the homestead, was protected only in the local courts; and these were weak. The King's peace, on the other hand, was enforced with vigour by royal officers of justice. At first it applied only in certain holy seasons, or to persons to whom it was specially granted by the King, or to places which were under the King's special protection (such as the precincts of his house and the four great roads)². These limits, however, soon became indefinitely extended. "The interests of the King and of the subject conspired to the same end³." The King profited in the way of fees, and the subject was anxious to appeal to the one authority which could not anywhere be lightly disobeyed. Accordingly, "after the Conquest, the various forms in which the King's special protection had been given disappear, or rather merge in his general protection and authority⁴." But even then the King's peace did not arise throughout the nation at large until he proclaimed it; and it lasted only till his death. So on the death of Henry I., the chronicler tells us, "There was seen tribulation in the land; for every man that could forthwith robbed another." Finally, as Edward I. was away in Palestine when his father died, the magnates themselves proclaimed the King's peace, in spite of his absence, to avoid the confusion which would otherwise have arisen. Thenceforward even the King's death was never regarded as suspending the royal peace.

A man attainted of praemunire was not under the King's peace; and, therefore, until 5 Eliz. c. 1, it was not murder to kill him⁵. On the other hand, to kill an outlaw was murder⁶;

¹ 1 Blackstone Comm. 350.

² Cf. Maitland's *Collected Papers*, II. 290-7.

³ Pollock, *Oxford Essays* (The King's Peace), p. 83.

⁴ *Ibid.* p. 87.

⁵ Y. B. 2 Ed. III. fo. 6, pl. 19.

⁶ 1 Hale P. C. 433.

and even a savage¹ or a condemned criminal² or an alien enemy³ is under the King's peace. Hence an alien enemy cannot lawfully be killed except in the actual course of true war⁴. In such he, of course, may; so, if the captured crew, on board a prize brought into British waters, should endeavour to release themselves from their British captors, and in the consequent struggle one of the prisoners should be killed by one of the captors, the homicide⁵ would not be felonious.

The law (as we are often told) is no respecter of persons. Without being universally true, this is a principle which has always applied with special force to the law of Homicide. Thus the villein could not be killed by his lord. Nor could the slave, even in Anglo-Saxon times, be killed by his master; for the laws of Alfred inflicted a fine on the master who murdered his slave, and this at a time when most homicides admitted of being atoned for by mere payment of a fine. The King's peace was powerful to protect both villein and slave from the extremity of tyranny. It is instructive to notice that, even in much more recent times, a West Indian legislature imposed on masters no severer responsibility than Anglo-Saxon legislation had done in their dealings with the lives of their slaves. Thus one of the Acts of Barbadoes⁶ ran as follows: "If any slave under punishment by his master, for running away or any other misdemeanor towards his master, unfortunately shall suffer in life (!) or member, no person whatsoever shall be liable to a fine. But if any man out of wantonness or cruel intention shall wilfully kill a slave of his own, he shall pay into the public treasury £15 sterling."

¹ See p. 136 n. *infra*.

² Y. B. 35 H. VI. 57; *Commonwealth v. Bowen*, 13 Mass. 356 (K. S. C. 91).

³ *E.g.* a prisoner of war; 1 Taunt. 32, 36.

⁴ Hence in 1902 four Zeeerust natives were sentenced to death by the criminal court at Pretoria for having killed a Boer in the war of 1900 *outside* their frontier, when their Chief's only commission from the British authorities was to defend his own territory. Similarly in the Transvaal, Van Aan was executed for having shot an English officer approaching under a flag of truce.

⁵ *Per James, L. J., in Dyke v. Elliott*, L. R. 4 P. C. 184.

⁶ No. 329, p. 125.

(5) *Malice aforethought*. The preceding elements in the definition of murder are common to all forms of criminal homicide; but this fifth point is the distinctive attribute of those homicides that are murderous. When, as we have seen,¹ the legislature determined to take away the "benefit of clergy" from the most heinous cases of homicide, it adopted the already familiar² notion of "malice aforethought" (*malitia praecogitata*) as the degree of wickedness which should deprive a homicidal "clerk" of his ancient right to escape capital punishment. The phrase is still retained in the modern law of murder; but both the words in it have lost their original meanings. For the forensic experience of successive generations brought into view many cases of homicide in which there had been no premeditated desire for the death of the person slain, and which yet seemed heinous enough to deserve the full penalties of murder. These accordingly, one after another, were brought within the definition of that offence by wide judicial constructions of its language. Hence a modern student may fairly regard the phrase "malice aforethought" as now a mere arbitrary symbol. It is a convenient comprehensive term for including all the very various forms of *mens rea* which are so heinous that a homicide produced by any of them will be a murder. But none the less it is only an arbitrary symbol. For the "malice" may have in it nothing really malicious; and need never be really "aforethought," (except in the sense that every desire must necessarily come before—though perhaps only an instant before—the act which is desired). The word "aforethought," in the definition, has thus become either false or else superfluous³. The word "malice" is neither; but it is apt to be misleading, for it is not employed in its original (and popular) meaning. A desire for the death of the individual who was killed—or,

¹ *Supra*, p. 126.

² See Prof. Maitland's *Collected Papers*, i. 305.

³ Contrast the "deliberateness" which the German Penal Code, § 211, requires for Murder; even an hour's interval being held too brief to constitute it; Mullins' *Leipzig Trials*, p. 200.

as for distinctness' sake it may be termed, "Specific Malice"—is not essential to murder. Blackstone, indeed, in his treatment of this crime, sometimes uses the word Malice as if in this narrow sense; but at other times he includes under it, and more correctly, other states of mind far less guilty. For there are several forms of *mens rea* which have been held to be sufficiently wicked to constitute murderous malice. They are the following:

(i) Intention to kill the particular person who, in fact, was killed. This, of course, is the most frequent of all the six forms.

(ii) Intention to kill a particular person, but not the one who actually was killed¹. If a man shoots at *A* with the intention and desire (or, as Bentham would express it, the "direct intention") of killing *A*, but accidentally hits and kills *B* instead, this killing of *B* is treated by the law not as an accident but as a murder². In old legal phrase, *malitia egreditur personam*; the *mens rea* is transferred from the injury contemplated to the injury actually committed. Austin has pointed out that such a murderer may have had any one of three mental attitudes with regard to the prospect of this latter injury. He may have—

(a) Thought it probable that he would hit *B* instead of *A*; and have risked doing so, though feeling no desire at all that *B* should be hit. Austin classes this as an "intention"; and Bentham gives it the specific name of "*indirect intention*." But in ordinary parlance it is not called "intention" at all³; because there was no desire of killing *B*.

(b) Thought it improbable that he would do so. This, Austin denominates "rashness."

(c) Not thought of it at all. This, Austin denominates "heedlessness."

¹ *Reg. v. Salisbury*, Plowden 100 (K. S. C. 102). Cf. Orsini's outrage, p. 419 *infra*; and *Commonwealth v. Mink*, p. 114 *supra*.

² Or manslaughter, if *A* has given such provocation as would reduce the killing of him to manslaughter; *Rex v. Gross*, 23 Cox 455.

³ Cf. p. 149 *infra*.

(iii) Intention to kill, but without selecting any particular individual as the victim. This has been conveniently called "universal malice." It is exemplified by the case put by Blackstone, of a man who resolves to kill the next man he meets and does kill him¹; and by the more frequent and more intelligible case of Malays who madden themselves, with hemp, into a homicidal frenzy, and then run "amok"; and by that of the miscreant who, about 1890, placed an explosive machine on board an Atlantic liner about to sail from Bremerhaven, in order to get the money for which he had insured part of the cargo. It is also exemplified by such atrocities as those attributed to the early settlers in Queensland, who are said to have rubbed poison into carcases of sheep or into masses of flour, and then placed them in the bush in hopes of their being eaten by the aborigines².

(iv) Intention only to hurt—and not kill—but to hurt by means of an act which is intrinsically likely to kill. There is an old case of a park-keeper who, on finding a mischievous boy engaged in cutting some boughs from a tree in the park, tied him to his horse's tail, and began to beat him on the back; but the blows so frightened the horse that it started off and dragged the boy along with it, and thus injured him so much that he died³. The park-keeper was held to be guilty of murder. More recently, in 1885, a very similar case was tried at the Lewes Assizes. In it, a cow-boy had tied a child, who annoyed him whilst he was milking, to one of the hind legs of a cow; but the cow took fright at this, and started off, and in its course dashed the child's head against a post. Here, the jury, with the approval of the judge, convicted the prisoner of manslaughter only. The case is of course distinguishable

¹ 4 Bl. Comm. 200.

² Haydon's *Trooper-Police of Australia*, p. 304. On Dec. 15, 1838, seven settlers were hanged in New South Wales for the unprovoked massacre of thirty natives; but pleaded "It has been so common that we had no idea it was against the law"; *ibid.* Cf. the case of Christiana Edmunds, who in 1872 used wilfully to supply a confectioner's shop with chocolate-creams imbued with strychnine.

³ *Rex v. Holloway* (1628), Cro. Car. 131 (K. S. C. 103).

from Halloway's; inasmuch as the cow, being both a less sensitive and a less active animal than the horse, was not so likely to do a serious injury. But the more lenient verdict is probably to be attributed less to this consideration than to the general tendency of modern tribunals to relax the severity of the old law of murder.

We have already seen¹ that even a parent or master, legally entitled to inflict corporal punishment upon a child, will be guilty of murder if he should, however unintentionally, kill the child by inflicting the punishment in some mode which was obviously likely to cause death. Thus in *Rex v. Grey*², where a blacksmith was charged with the murder of his apprentice by striking him on the head with a bar of iron, it was held that the use of so dangerous an instrument "is all one as if he had run him through with a sword." And, similarly, a mother who had punished her child by stamping on its body, and had thereby killed it, was held guilty of murder³.

(v) Intention to do an act which is intrinsically likely to kill, though without any purpose of thereby inflicting any hurt whatever⁴. Of this character is the intention of any workman who recklessly throws things off the roof of a house in a town, without looking over the edge to see if anyone is likely to be struck, or giving any warning⁵. We may add, as an instance of this fifth form of *mens rea*, Blackstone's case of the "unnatural" son who carried his sick father about, out of doors, in cold weather, which hastened the old man's death⁶. (This latter case, the printers of some thirteen successive editions of Stephen's *Commentaries* unwittingly represented as if it had been one of a deliberate intention to kill, by printing "rich" instead of "sick"!)

¹ *Supra*, p. 123.

² Kelyng 64 (K. S. C. 105).

³ K. S. C. 105.

⁴ *E.g.* purposely letting loose a fierce bull, though merely "to fright people and make sport" (2 Ld. R. 1573). Or, again, the blowing down of the wall of Clerkenwell Prison, Dec. 13, 1867, to make a gap through which some Fenian prisoners could escape; twelve bystanders were unintentionally killed, and a hundred and twenty wounded; *The Times*, Apr. 29, 1868.

⁵ *Supra*, p. 124. *Rex v. Hull* (1864), Kelyng 40 (K. S. C. 125).

⁶ *Supra*, p. 127. Y. B. 2 Ed. III. f. 18, Hil. pl. 1 (K. S. C. 92).

To treat this class of intentions as amounting to a murderous malice is perhaps impolitic; as being a more severe treatment than modern public opinion cordially approves. It certainly is felt by juries to be so. This was forcibly shewn at the trial of Leon Serné, at the Central Criminal Court in 1887¹. He set fire to his house, which he had insured for considerably more than its value; and in the fire his two boys perished. He had been a kind father; and he had no intention of causing the death of the boys. On an indictment for their murder, he was acquitted. The acquittal seems to have been due simply to the jury's dislike of the doctrine of "constructive" malice; for when indicted, in the following month, for arson, he was convicted. Yet if guilty of arson, he undoubtedly was legally guilty of murder.

(vi) (The older authorities add) Intention to commit a felonious act even though it be one unlikely to kill.

The oldest text-books had extended this principle to any *unlawful* act, but Sir Michael Foster limited it to *felonious* acts. Since his time, however, the effect of the rule, even as thus limited, has become enlarged, in consequence of various assaults and other acts having by statute been made into felonies. The illustration which Foster (*Crown Law*, p. 258) gives of this sixth rule is that of a man shooting at a fowl in order to steal it, and thereby accidentally killing a bystander. This, according to his view, would be murder; though if the intent had been merely to kill (and not to steal) the fowl, or if the bird aimed at had been a mere sparrow, the homicide would only have been manslaughter, as the act intended would not be a felony. Similarly, if a thief gives a man a push with intent to steal his watch, and the man falls to the ground and is killed by the fall—or if a man assaults a woman, with intent to ravish her, and she, having a weak heart, dies in the struggle—such a homicide would, according to Foster's rule, be murder.

¹ *Reg. v. Serné*, 16 Cox 311 (K. S. C. 106). Cf. the closely similar case of *Rex v. Loufer*, C. C. C. Sess. Pap. CLVIII. 488.

Yet the severity of this rule has led to its being doubted. As early as 1773, in *Lad's Case* (Leach 96), the judges hesitated to say whether it would be murder to cause a child's death by a rape¹. Both Stephen, J.², and Huddleston, B., instructed juries that the Court for Crown Cases Reserved would probably not uphold Foster's rule. The draft Criminal Code of 1880 omitted it. Such an omission would still leave such felonies as are intrinsically likely to cause death to be dealt with as cases of our last mentioned rule, No. (v); though homicide resulting from any felony which was *unlikely* to cause death would be only a case of "involuntary" manslaughter³. On the other hand, Lord Alverstone, L.C.J., said⁴ that "The experience of the judges shews that there are so many cases of death caused by attempts to commit felonies, that, for the protection of human life, it is not desirable to relax the rule which treats such crimes as murders."

Hence in the frequent cases in which death results from an abortion procured feloniously, yet by the woman's consent and therefore with no violence against her, and moreover in such a manner as seemed to involve no appreciable risk to her life, the judges formerly regarded it as clearly murder; and they passed sentences of death. But in later years these sentences were usually commuted by the Crown; and juries moreover shewed reluctance to convict of this merely "constructive" murder (cf. pp. 138, 275). Hence the judges developed a rule⁵ that, in such cases, the jury may convict of a mere manslaughter; unless they think that the prisoner must as a reasonable person have contemplated (or did in fact contemplate) that death or grievous bodily harm was likely to

¹ But it clearly is. See *Beard's Case*, 14 Cr. App. R. 163-4, 187, 199.

² See *Reg. v. Serné*, loc. cit.; *Reg. v. Horsey*, 3 F. and F. 287 (K. S. C. 109); Stephen, *Hist. Crim. Law*, III. 79; Blackburn, J., in *Reg. v. Pembrilton*, L. R. 2 C. C. R. at p. 121 (K. S. C. 159).

³ *Supra*, p. 119.

⁴ To the grand jury at Liverpool, March 9, 1909.

⁵ *Reg. v. Lumley*, 22 Cox 635; *Reg. v. Whitmarsh*, 62 J. P. 711; cf. 12 Cr. App. R. 15, and 16 Cr. App. R. 24. This new rule unfortunately puts the practised abortionist into a more advantageous position than the mere first offender. Both Scotland and Ireland still retain the older and sterner doctrine.

result¹. Thus our sixth rule must be limited to such felonious acts as involve violence to an unwilling victim².

(vii) There is authority for including, amongst the cases of malice that give the character of murder to homicide produced by acts that were *not* likely to kill, one form of intention which would not even be felonious; viz. the intent knowingly to oppose by force an officer of justice, when engaged in arresting or imprisoning an offender. Sir James Stephen, for example, maintains that even if the opposition took no more violent form than merely that of tripping up the officer, yet, should his fall accidentally kill him, the case would be one of murder³. But he appears to have drawn this severe doctrine merely from general language used in the old authorities. In all the reported cases in which officers were killed, the actual means appear to have been intrinsically dangerous ones. Hence, in view of the modern tendency to narrow even the accepted rules as to constructive malice in murder, it may well be doubted whether the Court of Criminal Appeal would support this less definitely established doctrine. But the corresponding court in Ireland has ruled in its favour (*The State v. McMullen* [1925], 2 Ir. 9); saying that if the fugitive fired back towards the pursuing arrestor, there would be Murder even if he did not *mean* to hit him.

The existence of these various forms of "murderous malice" shew it to be much wider than mere "malice" in the popular sense, viz. ill-will; though much narrower than malice in the technical legal sense, viz. *mens rea*. Every intentional homicide is *primâ facie* presumed to have been committed with a murderous malice⁴; so that the defendant has the

¹ Hence it is well to add an express count for Manslaughter, so that the Murder count, if not pressed, may be dropped altogether.

² See 14 Cr. App. R. at p. 116, and p. 187.

³ *Dig. Cr. Law*, Art. 315; Illustration 11.

⁴ Indeed the strict rule does not require Intention, but only that the death be due to the prisoner's act (not his mere omission); 9 Cr. App. R. 63; 8 Ir. C. L. 178; *Rex v. Wittig*, Australia [1919] 158. See the elaborate judgment in *Commonwealth v. York* (43 Am. Dec. 373).

burden¹ of shewing, if he can², that the circumstances were such as to reduce it to a manslaughter or a non-criminal homicide³. But he may, of course, do this even by mere cross-examination of the Crown witnesses themselves. If the circumstances raise even a reasonable doubt as to its being murder, the jury should resolve that doubt in favour of the accused.

As regards the malice which is to be imputed to the various members of a group of wrong-doers when one of them commits a homicide, the rule is that, if several persons act together in pursuance of a common intent, every act done in furtherance of it by any one of them is, in law, done by all. Hence if persons have agreed to waylay a man and rob him, and they come together for the purpose armed with deadly weapons, and one of them happens to kill him, every member of the gang is held guilty of the murder. But if their agreement had merely been to frighten the man, and then one of them went to the unexpected length of shooting him, such a murder would affect only the particular person by whom the shot was actually fired⁴.

(6) *A year and a day*. "Day" was here added⁵ merely to indicate that the 365th day after that of the injury must be included. Such an indication was rendered necessary by an old rule (now obsolete) that, in *criminal* law, in reckoning a period "from" the doing of any act, the period was (in favour of prisoners) to be taken as beginning on the very day when this act was done⁶.

The doctrine that a charge of homicide could not be sustained unless the death ensued within a limited period after the injury that caused it, was a wise precaution in view of

¹ Hence, if he decline to go into the witness-box, the judge will be unusually apt to exercise his privilege (*infra*, p. 408) of commenting on that fact.

² *E.g.* by the extenuating fact of Intoxication; see p. 61 *supra*.

³ As to the kindred rule in manslaughter by negligence, see p. 123 *supra*.

⁴ See *Reg. v. Macklin*, 2 Lewin 225 (K. S. C. 100).

⁵ As early as before 1330; Fitzh. *Corone*, 163.

⁶ Hob. 139. But now see *Radclyffe v. Bartholomew*, L. R. [1892] 1 Q. B. 161.

the defectiveness of medical science in mediæval days. In Holland, indeed, so brief a period as six weeks was adopted; but the modern Roman-Dutch law of South Africa, in view of the present advanced state of forensic medicine, recognises no time-limit (Nathan, § 2605). Nor is any recognised in Scottish law (Hume I. 186); nor in the Indian Penal Code. But in England the common-law rule is still retained, and has been applied in even a case of manslaughter (*Rex v. Dyson*, L. R. [1908] 2 K. B. 454).

The punishment of murder is death¹. But until 1828 those murders which constituted an act of petit-treason (*e.g.* where a person was murdered by his wife or servant, or a bishop by one of his clergy) received an enhanced punishment. The offender, if a male, instead of being taken in a cart to the scaffold, was dragged thither on a hurdle; and, if a woman, was not hanged but burned, as in the case of Catherine Hayes, in 1726, familiar to readers of Thackeray. By 31 Vict. c. 24, s. 2, every execution *for murder* must take place within the prison walls, before such persons only as the sheriff may admit. It should be noted that this necessity does not extend to the other three offences which still continue to be punishable with death (*viz.*: treason², piracies that are accompanied by any act which endangers life³, and the arson of a royal dockyard or man-of-war⁴). Yet the execution of Roger Casement for treason took place (August 3, 1916) inside the prison.

As murder is so heinous an offence, the legislature has enacted severe penalties for even mere incipient approaches to it. Thus any conspiracy to murder, though it still remains only a misdemeanor, is by statute punishable with ten years' penal servitude⁵, a far higher maximum of punishment than is allowed in the case of many felonies. And every attempt

¹ Except for murderers not yet sixteen, who, instead, are "detained" during the King's pleasure. *Supra*, p. 51; *infra*, p. 489.

² Petit-treason is abolished. ³ 7 Wm. IV. and 1 Vict. c. 88.

⁴ 12 Geo. III. c. 24, s. 1; 7 and 8 Geo. IV. c. 28, ss. 6, 7.

⁵ 24 and 25 Vict. c. 100, s. 4.

to commit a murder is now made by statute¹ a felony, and is punishable with penal servitude for life.

In concluding this subject, it may be added that murder affords a noteworthy exception to the general legal rule that "criminal jurisdiction is territorial²." Every nation tries and punishes all crimes committed in its own territory (or on its own ships), whether committed by its own subjects or by foreigners. Conversely, on the same principle, a nation usually does not concern itself with crimes committed anywhere else, even though committed by its own subjects. But to this latter branch of the rule, homicide has been made an exception in English law, by a succession of statutes commencing as far back as Henry VIII. The enactment now in force is 24 and 25 Vict. c. 100, s. 9; under which the courts of any part of the United Kingdom may try a British subject for *murder or manslaughter* committed by him anywhere outside the United Kingdom, whether within or without the Empire, provided it were on land. The power thus does not extend to homicides committed on a foreign ship. It is immaterial whether the person killed were a British subject or not. (It may be convenient to add here that similarly Bigamy, when committed by a British subject, even in a foreign country, may, by virtue of s. 57 of the same statute, be tried in the United Kingdom.)

As regards the effect of felonious homicide upon rights of property, it should be noted that both murder and manslaughter debar the killer from receiving any benefit under his victim's Will (*Re Crippen*, L. R. [1911], P. 108). It has been said that it might be otherwise under an Intestacy, as the Statute of Distributions speaks imperatively; but cf. *Re Gray* (*The Times*, June 24, 1924), with L. R. [1915] 2 Ch. 173. A policy of insurance on the life of the victim, effected by the killer with a view to the killing, is invalid, as a fraud; 25 Beavan 605.

¹ *Ibid.* ss. 11-15.

² *Infra*, p. 416. *Macleod v. Att.-Gen.*, L. R. [1891] A. C. 455.

CHAPTER X

OFFENCES AGAINST THE PERSON THAT ARE NOT FATAL

CRIMES of this class are of two sharply distinguished types, the sexual and the non-sexual; the one springing from lust, the other from anger.

To these offences that are of the former type, a very brief reference will be sufficient for the purposes of the present volume. The mediæval English law adopted, in all their entirety, the lofty ethical teachings of Christianity as to the mutual relations of the sexes. Those teachings are, for example, strictly followed by the common law in its doctrine of contract, when deciding what agreements shall be regarded as too immoral for the courts to enforce¹.

And the same teachings were enforced by punitive sanctions in the ecclesiastical courts; a jurisdiction which, though long obsolete in practice, has never been formally abolished². But the common law had no penal prohibitions of similar comprehensiveness; its criminal rules taking cognisance only of those grosser breaches of sexual morality that were rendered peculiarly odious, either by the abnormality of the form they took³, or by the violence with which they were accompanied; aggravations to which the legislature subsequently added that of the tender age of the female concerned in them⁴; or of her near consanguinity⁵. Hence, the voluntary illicit intercourse of the sexes, even though it take the form of mercenary prostitution or of an adulterous violation of marital legal rights, furnishes no ground for a criminal indictment. Such a limitation of the sphere of penal law, like the

¹ Anson on Contracts, Part II. VII. 1 (16th ed. p. 249).

² Stephen, *Dig. Cr. Law*, Art. 170; *Hist. Cr. Law*, II. 396-429. See the authorities cited *arguendo* in *Phillimore v. Machon*, L. R., 1 P. D. 481.

³ Stephen, *Dig. Cr. Law*, ch. XVIII.

⁴ *Ibid.* ch. XXIX.

⁵ Punishment of Incest Act, 1908; 8 Edw. VII. c. 45.

modern abandonment of the ecclesiastical courts' penalties, is abundantly justified by the considerations, which have been already set out¹, that distinguish those injurious acts that can prudently be repressed by criminal sanctions, from such as will more fitly be left to be restrained by the penalties of social opinion and of religion.

From this class of offences against the person we may pass to those that are unconnected with sexual relations. These call for a detailed consideration. They fall readily into two groups: according as the crime does or does not leave behind it, upon the sufferer's body, some actual hurt. The former alternative must first be considered.

A. Offences where actual bodily injury is occasioned².

The present law regarding this aggravated class of crimes is entirely the creation of statutes. Wounding and maiming did, in early times, entitle the sufferer to bring an "appeal" of felony³; and if the appeal were successful the wrong-doer forfeited life and member. But these appeals seldom proved successful; as they were usually quashed for some technical informality; and if the appellee were then arraigned at the King's suit he received no heavier punishment than that of a mere misdemeanor—imprisonment or fine. Appeals for wounding consequently died out; though the injured parties, if unwilling to indict the offender for a mere assault, had still the alternative of a civil remedy in the shape of an action of trespass⁴ to recover pecuniary damages. But subsequently, by various statutes, offences of this class have again been exposed to a more adequate punishment. The present law on the subject is, however, as Mr Justice Wright has said, "singularly fragmentary and unsystematic⁵." It is mainly to be found in the Act of 1861 consolidating the enactments that dealt with offences against the person (24 and 25

¹ *Supra*, p. 26.

² See Stephen, *Hist. Cr. Law*, III. 108–120; *Dig. Cr. Law*, Arts. 257–268.

³ *Supra*, p. 19.

⁴ Pollock and Maitland, II. 487.

⁵ *Draft Criminal Code for Jamaica*, p. 106.

Vict. c. 100). By this Act the graver offences are made felonies, the others ranking as misdemeanors. We may mention some salient instances of each class.

1. *Felonies.*

(a) It is a felony, punishable with penal servitude for life, unlawfully and maliciously to wound or cause any grievous bodily harm to anyone—or shoot (or even attempt to shoot) at him—*with intent* to maim, disfigure, disable, or do any other grievous bodily harm, or prevent an arrest¹.

Some of the phrases here used are so technical as to need explanation. Thus, to constitute a “wound” the continuity of the skin must be broken; *i.e.* that of both² skins, *cutis vera* as well as epidermis³. Hence a mere scratch in the latter is not a wound; nor will it even suffice that bones have been fractured if the skin is not broken also. Harm may be “caused” without personal contact; so, if *A* break his leg by jumping out of a window to avoid *B*’s threatened attack, *B* is indictable for “causing” this injury⁴.

Bodily harm becomes “grievous” whenever it seriously interferes with health or even with comfort. It is not necessary that its effects should be dangerous, nor that they should be permanent⁵. The rather vague question as to whether, in any particular case, the harm done was serious enough to be classed as grievous, is for the jury to determine.

To “maim” is to do such a hurt to any part of a man’s body that he is rendered less capable, in fighting, either of defending himself or of annoying his adversary.

The statutory “attempt” to shoot at a person is not made

¹ 24 and 25 Vict. c. 100, s. 18.

² The “three skins” of the older anatomists. Internal skin, *e.g.* in the mouth, suffices.

³ So no injury can be a wound unless it do bleed. Thus a burn is not a “wound”; nor is a kick that causes internal hæmorrhage but breaks no skin.

⁴ *Reg. v. Parker*, C. C. C. Sess. Pap. LIX. 393. Cf. p. 128 *supra*.

⁵ Merely that “the shoulder was very much bruised” was held insufficient (C. C. C. Sess. Pap. LXXXI. 440); but harm that causes a week’s confinement to bed may suffice (1 C. and D. 81). “Any bullet-wound, in any part of the body,” even a finger, suffices (*Avory, J.*).

until some really proximate step is taken; as, for instance, that of drawing the trigger; cf. p. 81 *supra*. Hence merely to point a loaded pistol at a man (though it does amount to an "assault" on him) will not suffice for the crime we are now considering. But to pull the trigger, even though the discharge fails through a defect in the cartridge (or barely to put your finger on the trigger with the intention of pulling it, even though you be interrupted before you actually pull it), does suffice to constitute an attempt to shoot, within the statute¹.

In this crime (unlike murder, see p. 140 *supra*) the Crown must prove the Intent. But the act itself *may* afford sufficient proof. Thus, to fire maliciously a loaded pistol at short range must shew this "intent of doing grievous bodily harm" (and it may well shew an intent to murder).

The wording of the statute does not make it necessary that the person whom it was intended to harm should be the one actually harmed.

(b) It is a felony, punishable with penal servitude for ten years, unlawfully and maliciously to administer any poison or other noxious thing to anyone so as thereby to endanger his life or inflict upon him grievous bodily harm².

2. *Misdemeanors.*

Each of the three following statutory misdemeanors is punishable with five³ years' penal servitude.

(a) Unlawfully and maliciously⁴ wounding, or inflicting any grievous bodily harm upon, any person⁵.

This offence differs from the somewhat similar felony above referred to as "1 (a)," in that the felony requires an actual intention to do the particular kind of grievous bodily harm, whereas in the misdemeanor it is sufficient that such harm has been done "maliciously," even though there was no intention to produce the full degree of harm that has actually

¹ *Reg. v. Duckworth*, L. R. [1892] 2 Q. B. 83.

² 24 and 25 Vict. c. 100, s. 23. ³ Not merely *three*, as sometimes stated.

⁴ Hence *accident* would not suffice. ⁵ 24 and 25 Vict. c. 100, s. 20.

been inflicted. Here we again meet with "that most unsatisfactory of all expressions"¹—*malice*. But the "malice" required here is something narrower than that vague general idea of a wicked state of mind which the word usually denotes at common law², as in cases of homicide or in the phrase "motive of malice"³. For in *statutory* wrongs the word "malice" is presumed to have been employed by the legislature in a precise sense; so as to require a wickedness which included an actual intention to do an injury, and, moreover, an injury of the same kind as that which in fact was done. Thus the intention to injure a man's body is not such malice as will support an indictment for malicious injury to his property; and similarly *vice versâ*. Accordingly if a stone aimed at a person misses him, but crashes through a window, the thrower will not necessarily be guilty of "maliciously" breaking this window⁴. And, similarly, had the stone been flung at the window, and then intercepted on its flight by the head of someone who unexpectedly looked out of the window, the thrower would not necessarily have committed a "malicious" injury to this person. In either of these two cases, however, there would be a sufficient "malice," if the man who threw the stone in the desire of doing the one kind of harm, knew that it was likely that the other kind might be done, and felt reckless as to whether it were done or not, though not desiring it⁵.

But if the harm done be of the *kind* intended, this is sufficient; even though it be produced in some degree, or in some manner, or upon some subject, that was not intended. Thus where a soldier aimed a blow at another man with his

¹ Prof. F. C. Clark, *Analysis of Criminal Liability*, p. 82. "One of the most perplexing legal terms;...continually used in conflicting senses" (Bigelow on Torts, § 35).

² Cf. 2 Ld. Raymond 1485.

³ *Infra*, p. 473. Yet it is not so narrow as the popular sense of "spite"; any more than it is in the definition of Murder (see p. 134 *supra*).

⁴ *Reg. v. Pembilton*, L. R. 2 C. C. R. 119 (K. S. C. 157). Similarly, if a horse be hurt by a shot aimed at its rider; 1 C. and D. 186.

⁵ *Re Borrowes*, Ir. L. R. [1900] 2 K. B. 593.

belt, but the belt bounded off and struck a woman who was standing by, and cut open her face, he was held guilty of maliciously wounding her¹.

Much confusion hangs around the three cognate words—Malice, Intention, Purpose². Clearly “purpose” always involves the idea of a desire. So, also, in popular parlance does “intention”; for a man is not ordinarily said to “intend” any consequences of his act which he does not desire but regrets to have to run the risk of³ (*e.g.* when he shoots at an enemy, though seeing that a friend is close to the line of fire). Yet in law it is clear that the word “intention,” like the word “malice,” covers all consequences whatever which the doer of an act foresees as likely to result from it; whether he does the act with an actual desire of producing them, or only in recklessness as to whether they ensue or not⁴. The fact that he had means of knowing⁵ a consequence to be likely, raises a *primâ facie* presumption that he did actually foresee it as being so. There is such a great difficulty in obtaining any evidence to rebut this presumption, as usually to render it practically equivalent to a conclusive one⁶.

Accordingly, to give legal proof of malice is less difficult than might theoretically have been expected. If the act was unlawful, and done with a bad motive, and was at all likely to cause injury of the kind that did in fact result, there is enough *primâ facie* proof of “malice” to warrant a conviction. Thus, where *A* was engaged in shooting wild-fowl, and *B* fired a gun in the direction of *A*’s boat with the mere object of frightening *A* so as to make him give up his sport, but, owing to the boat’s being suddenly slewed round, the shot

¹ *Reg. v. Latimer*, L. R. 17 Q. B. D. 359 (K. S. C. 144).

² The reader should study Sir J. Salmond’s exposition (*Jurisprudence*, chs. xvii., xviii., xix.).

³ Prof. E. C. Clark’s *Analysis of Criminal Liability*, pp. 73, 78; Markby’s *Elements of Law*, s. 222. And see above, p. 135.

⁴ *Reg. v. Welch*, L. R. 1 Q. B. D. 23. Cf. Mr Justice Wright’s *Draft Criminal Code for Jamaica*, pp. 3, 98; Austin, Lecture xxi.

⁵ As to “Knowledge,” see p. 255 *infra*.

⁶ But it is *not* conclusive. See p. 333 *infra*.

actually struck *A*, it was held that there was sufficient evidence of malice on the part of *B*¹. And where *A*, merely in order to frighten *B*, pointed at him a gun which he knew to be loaded, and then, in consequence of *B*'s own act in seizing the muzzle, the gun accidentally went off and shot *B*, it was held by Wills, J.², that there was a sufficiently "malicious" wounding.

Unlawfully inflicting grievous bodily harm *without* (strict statutory³) "malice," is not known to the law as a specific offence; and can at most be dealt with as a mere form of assault. If it were inflicted by mere *negligence*, however gross, it probably, in *criminal* law, is not even an assault⁴; and thus is no offence at all, unless death results from it⁵. The quack, who makes his patient lose a limb or an eye, is only liable civilly and not criminally.

The question as to what kind of causation will suffice to constitute an "inflicting" shall be considered later on⁶.

(b) Occasioning actual bodily harm by an assault⁷.

The reason of the framers of the Act of 1861 for separating this offence from that last described (*viz.* "2 (a)") is not obvious; especially as they both entail the same punishment. Indeed, "occasioning actual bodily harm by an assault" would seem a description wide enough to include all the acts covered by 2 (a); unless "inflict" be taken to have been used by the legislature as a wider word than "assault," and as capable of including the production of harm by some indirect and protracted chain of causation, *e.g.* by poisoning (see p. 151), or infecting with disease. Arguments of great force have been used in favour of this wide construction⁸. And we may add to them that in *Reg. v. Halliday*⁹ the Court for Crown Cases Reserved held that grievous bodily harm had

¹ *Reg. v. Ward*, L. R. 1 C. C. R. 356.

² Cambridge Assizes, Oct. 1899.

³ *Supra*, p. 148.

⁴ *Infra*, p. 159. *Reg. v. Latimer*, L. R. 17 Q. B. D. 359 (K. S. C. 144).

⁵ Or unless it were negligence in managing a "vehicle"; see p. 151 *infra*.

⁶ *Infra*, p. 151.

⁷ 24 and 25 Vict. c. 100, s. 47.

⁸ See *per* Hawkins, J., in *Reg. v. Clarence*, L. R. 22 Q. B. D. at p. 49.

⁹ 61 *Law Times*, 699. Cf. 7 Cr. App. R. 197; and L. R. 8 Q. B. D. 54.

been "inflicted," where the defendant had merely frightened a woman so that she jumped from a window and was hurt; and this frightening, though an "assault" in the old technical meaning of that word was no assault in the modern sense of a "battery." But in *Reg. v. Clarence*¹, when the majority of the Court held that the communication of venereal disease by a husband (even though he knew of it) to his wife (even though she did not know of it) was no assault, inasmuch as there was consent to the contact, they decided that it consequently was not an "*inflicting* of grievous bodily harm"; on the ground that they considered that an "*inflicting*" must be by assault and battery² and requires a direct and immediate causing of the harm.

(c) Unlawfully and maliciously administering to anyone any poison or other noxious thing with intent to injure, aggrieve, or annoy him³.

If the thing administered be a recognised "poison," it seems probable that the offence would be committed by giving even a quantity so small as to be incapable of doing harm⁴. But if it be not a poison, and be "noxious" only when taken in large quantities (as, for example, castor-oil or ardent spirits), the offence will not be committed by giving a person only a small dose of it.

A misdemeanor less severely punishable (*viz.* only by two years' imprisonment with hard labour), is committed when any person having the charge of any carriage or vehicle (for instance, a bicycle) causes bodily harm to any one by wanton or furious driving, or racing, or other wilful misconduct, or even merely by wilful *neglect*⁵.

¹ L. R. 22 Q. B. D. 23. Cf. *Hegarty v. Shine*, 14 Cox 145.

² Wills, J., at p. 37; Stephen, J., at p. 41; Pollock, B., at p. 62.

³ 24 and 25 Vict. c. 100, s. 24.

⁴ See *per* Field, J., and Stephen, J., in *Reg. v. Cramp*, L. R. 5 Q. B. D. 807; a case arising upon similar words in a different statute.

⁵ 24 and 25 Vict. c. 100, s. 34. "'Wilfully' means deliberately, not by inadvertence" (Lord Russell, L.C.J., 47 W. R. 369). It has been held by Acton, J. (C. C. C., April 19, 1923) that the driver's neglect must be of the criminal, *i.e.* wicked, degree (cf. *supra*, p. 122).

B. Offences in which actual bodily harm is not essential.

An "assault" is an unlawful attempt, or offer, to do with violence a corporal wrong to another person¹. A "battery" is such a wrong actually done to him in an angry, revengeful, rude or insolent manner. In other words, an assault is a movement which attempts, or threatens, the unlawful application of force² to another person; whilst such an application itself, when actually effected, constitutes a battery. Thus riding *at* a person is an assault, riding *against* him is a battery. Even a mere assault, without any battery, is not only a tort but also a misdemeanor. Hence if a battery ensue, it does not enhance the degree of the crime; though it is important as affording clear proof of the hostile intention of the movements which constitute the assault. Usually, of course, both the two offences are committed together; and the whole transaction is legally described as "an assault and battery." This became shortened in popular language to "an assault"; and now the current speech even of lawyers habitually uses that word as if inclusive of "battery."

Even in a battery, no actual harm need be done or threatened. The slightest force will suffice, if it were exercised in a hostile spirit; thus merely spitting on a person may amount to an indictable battery³. The force applied (or threatened) need not involve immediate contact of the assailant with the sufferer. Thus it is sufficient if harm is done (or threatened) to a person's clothes without touching his skin. And, similarly, the hostile force may be exercised either directly or even indirectly; as by striking a horse and

¹ An assault committed in a *public* place becomes an "Affray." For an assault without a battery, see *Smith v. Newsum* (3 Keble 283).

² The learned editors of Russell on Crimes consider (p. 839) that "force" here includes light, heat, gas, electricity, or odour.

³ A MS. in the British Museum records an action of assault brought in 1693 against a tavern-keeper whose servants had refused to let the plaintiff leave until he paid his bill. Lord Holt declared the detention illegal; "but ordered *small* damages."

thereby making it throw its rider¹, or by breaking the ice just in front of a skater².

To deprive another person of his liberty will usually involve touching or threatening to touch him; and thus the tort of false imprisonment usually involves an obvious assault. And even though the force used for that tort do not involve any threat of contact, it is held still to amount to an assault civilly; and, if the assailant knew himself to be acting wrongly, to an indictable assault³. Some bodily *movement* is essential to an assault or battery; so that supposing you only offer mere motionless obstruction, acting as if you were "a door or a wall"⁴—as where a cyclist is brought down by collision with a person who only stands still, however wilfully, in front of him—no proceedings can be taken for assault. (The much graver offence of "maliciously causing grievous bodily harm," may, however, have been committed.) Similarly, mere words, however threatening, can never make an assault⁵. Yet they may *unmake* an assault; as in a case where a man laid his hand menacingly on his sword, but at the same time said, "*If it were not assize time, I'd run you through the body*"⁶."

Alarm is essential to an assault. Hence if a person who strikes at another is so far off that he cannot by possibility touch him, it is certainly no assault. And it has even been said that to constitute an assault there must, in all cases, be

¹ *Dodwell v. Burford*, 1 Mod. 24.

² *Stephen's Digest*, art. 241 n. Similarly in *Rex v. Jolly* (S. A. L. Rep. 1923, 176) the Supreme Court of South Africa held that a "battery" had been committed when *J* so tampered with a railway line as to secure the derailment of the next train, several hours later, and a consequent hurt to the engine-driver.

³ *E.g.* where an accoucheur was locked into the patient's room, lest he should depart before her child was born; C. C. C. Sess. Pap. cxli. 577. But a doubt was there expressed as to the *criminality* of an imprisonment inflicted in a *bonâ fide*, though erroneous, belief of right, *e.g.* in a wrongful arrest.

⁴ *Innes v. Wylic*, 1 C. and K. at p. 263.

⁵ Thus the alarming utterance which caused "weeks of physical suffering" in *Wilkinson v. Downton* (L. R. [1897] 2 Q. B. 57) was no assault.

⁶ *Tuberville v. Savage*, 1 Mod. 3

the means of carrying the threat into effect¹. Accordingly, whilst pointing a loaded pistol at a person is undoubtedly an assault, it was held, in *Reg. v. James*², that it was no assault to present an unloaded one. But in an earlier case, *Reg. v. St George*³, it was held, on the contrary, that if a person presents a firearm which he knows to be unloaded, at a man who does not know that it is unloaded, and who is so near that (were it loaded) its discharge might injure him, an assault is committed. This latter view, which makes the offence depend upon the alarm naturally (however mistakenly) aroused in the person threatened, is in accord with the Scotch law⁴; and it agrees with the predominance of authority in America, where this question has much more frequently arisen than in this country⁵.

Poisoning, where the poison (as is usually the case) is taken by the sufferer's own hand, does not constitute an assault⁶. A contrary view was at one time taken here; and is still favoured in America⁷. But it is essential to an assault that there should be a personal exertion of force by the assailant. If therefore the actual taking up of the glass was the act of the person poisoned, there is no assault⁸; even though he took it in consequence of the poisoner's false representation that it was harmless. The further argument has been urged, that poison, unlike an ordinary "battery," takes effect internally instead of externally, and acts chemically instead of mechanically.

¹ *Per Tindal, C. J.*, in *Stephens v. Myers* (1830), 4 C. and P. 349.

² (1844), 1 C. and K. 530.

³ (1840), 9 C. and P. 483 (contrast 626). So Comyn's *Digest* tit. Battery, A. n. r.

⁴ 1 Broun 394; and with Queensland law (Q. L. R. 1911, p. 206).

⁵ See, for the liability, *Commonwealth v. White*, 100 Mass. 407; and, against it, *State v. McKay*, 44 Texas 43. In 1891 the Supreme Court of New South Wales pronounced for the liability (12 N. S. W. 113); though in 1870 it had decided against it (9 S. C. R. 75).

⁶ See *Reg. v. Clarence*, L. R. 22 Q. B. D. at p. 42.

⁷ *Commonwealth v. Stratton*, 114 Mass. 303.

⁸ But there will be a statutory offence (see pp. 147, 151) of "administering poison."

The exercise of force against the body of another man is not always unlawful¹. The principal occasions on which it is legally justifiable (provided that no more force is used than is proportionate to the immediate need) are the following:

(1) In the furtherance of public authority; as in preventing a breach of the peace, or arresting² a felon, or executing any process issued by a court of law, or forcibly feeding a "hunger-striking" prisoner (26 T. L. R. 139). This has been already sufficiently considered in Homicide³.

(2) In correcting your children, or the scholars or apprentices who have been placed under your authority. This right has also been already considered⁴.

(3) In defending either (a) your person, or (b) your existing lawful possession of any property (whether it consist of lands or merely of goods).

"Nature prompts a man who is struck to resist; and he is justified in using such a degree of force as will prevent a repetition" (Parke, B.). Nor is it necessary that he should wait to be actually struck, before striking in self-defence. If one party raise up a threatening hand, then the other may strike. Nor is the right of defence limited to the particular person assailed; it includes all who are under any obligation, even though merely social and not legal, to protect him. The old authorities exemplify this by the cases of a husband defending his wife, a child his parent, a master his servant, or a servant his master⁵ (and perhaps the courts would now take a still more general view of this duty of the strong to protect the weak⁶). A familiar modern instance is the force exercised by the stewards of a public meeting to remove those who persistently disturb it.

¹ Cf. *supra*, pp. 102-111.

² But any unnecessary handcuffing would be an assault; 3 D. and R. 300.

³ *Supra*, p. 103.

⁴ *Supra*, p. 109. It was upheld in 1910 for an apprentice as old as seventeen; *McGee v. Robinson* (*The Times*, Nov. 30, 1910).

⁵ Cf. p. 103 n. 7 *supra*; *Reg. v. Rose*, 15 Cox 540 (K. S. C. 140).

⁶ Cf. L. R. 2 C. C. R. 178; 11 Mod. 242; 1 East P. C. 292; and *Stanley v. Commonwealth* 9 Am. State Rep. 305. See p. 103 *supra*.

But the justification covers only blows struck in sheer self-defence and not in revenge. Accordingly if, when all the danger is over and no more blows are really needed for defence, the defender nevertheless strikes one, he commits an assault and battery¹. The numerous decisions that have been given as to the kind of weapons that may lawfully be used to repel an assailant, are merely applications of this simple principle. Thus, as we have already seen², where a person is attacked with such extreme violence that his very life is in danger he is justified in even killing his assailant. But a mere ordinary assault must not be thus met by the use of firearms or other deadly weapons³. And, similarly, a knife is not usually a proper instrument of self-defence, but must only be employed where serious bodily danger is apprehended, or where a robbery (*i.e.* a theft *by violence*) is to be prevented⁴. Hence it is unjustifiable for a man to use it where the attack upon him is made with a mere strap⁵. It should, however, be noted that where more force than was necessary has been used for self-defence, the case is not to be treated as if all the force employed had been illegal. The fact that part of it was justifiably exerted may, for instance, have the effect of reducing a charge of "wounding with intent to do grievous bodily harm" to one of mere unlawful wounding.

The right of self-defence extends, as we have said, to the defence not only of your person but also of your property. Thus force may lawfully be used in expelling anyone who is trespassing in your house, or on your land (or even on a railway-carriage *reserved* for you)⁶, if no milder mode of getting rid of him would avail. Hence if his entry had itself been effected forcibly, as by a burglary or even by breaking open a gate, you may at once use force to expel him⁷. But

¹ *Reg. v. Driscoll*, C. and M. 214 (K. S. C. 151).

² *Supra*, p. 103.

³ *Osborn v. Veitch*, 1 F. and F. 317 (K. S. C. 150).

⁴ *Reg. v. Hewlett*, 1 F. and F. 91 (K. S. C. 150).

⁵ Or to repel with a razor an attack by the mere fist; 4 Cr. App. R. 51.

⁶ Cf. L. R. [1915] 1 K. B. 1.

⁷ *Green v. Goddard*, 2 Salk. 641 (K. S. C. 147).

in the case of an ordinary peaceful trespasser, it will not be until you have first requested him to depart, and he has failed to comply with the request, that you will be justified in ejecting him by the strong hand. Disturbance of an easement is a wrong in the nature of a trespass, and therefore force may similarly be used to prevent it¹.

A similar right exists in the case of movable property. Force may accordingly be used to resist anyone who attempts to take away your goods from you². And there is modern authority³ for saying that force may even be used to *recapture* your goods, after they have been actually taken out of your possession. In the case of real property this right to recover by force certainly does not exist. Under an Act of Richard II. (A.D. 1381) a landlord commits an indictable offence by "forcibly entering" a house, although it is his own, if any full (though unlawful) possessor is excluding him⁴. For real property, unlike personal, is in no danger of being meanwhile destroyed, or lost, if the owner waits to sue at law for it.

(4) There is, again, a legal justification for the trifling degree of force involved in those petty instances of contact which inevitably arise in the ordinary social intercourse of everyday life; such as tapping a friend's shoulder to attract his attention, or jostling past one's neighbour in a crowd. But, to be thus justifiable, these acts must be done *bonâ fide*⁵, and with no unusual vehemence.

(5) There is, further, a justification for acts that are done by consent of the person assaulted; unless the force be a breach of the peace, or be causelessly dangerous. *Volenti non*

¹ Or to defend your due precedence in a procession. *E.g.* contest between a D.D.'s wife and a J.P.'s wife; *Ashton v. Jennings*, 2 Levinz 133.

² *Bird v. Jones*, L. R. 7 Q. B. D. 742.

³ In *Blades v. Higgs* (11 H. L. C. 621) the House of Lords seems to have tacitly accepted this doctrine; cf. Halsbury, xxvii. 868. Yet see Pollock on Torts, 12th ed. p. 393.

⁴ *Newton v. Harland*, 1 M. and G. 744; cf. L. R. 17 Ch. D. at p. 188.

⁵ A man was indicted at the Central Criminal Court in 1925 (June 18) for an assault on his former fiancée, though her utmost charge was "He caught hold of my coat and said he wanted a few words with me." Sankey, J., left it to the jury; but only as "a very, very small matter." They acquitted.

fit injuria. Hence seduction is no assault, either in the law of crime or even in that of tort.

But the consent must be given freely (*i.e.* without force, fear or fraud), and by a sane and sober person, so situated as to be able to form a reasonable opinion upon the matter to which consent is given¹. "Fraud vitiates consent"; if the fraud relate to a fundamental Fact², like the identity of the deceiver, or the nature of the assault. Accordingly an impostor who, by pretending to be a surgeon, induces an invalid to submit to be operated upon by him, will be guilty of assault, notwithstanding the consent which was nominally given. As regards the mental capacity to consent, it may be mentioned that, in the case of indecent assaults, the legislature has established a definite rule as to age, by enacting that consent given by a child of either sex under sixteen years of age shall not constitute a defence³. And, again, even the most complete consent, by the most competent person, will not suffice to legalise an assault which there are public grounds for prohibiting. Thus consent is no defence, criminally⁴, for any assault that involves some extreme and causeless injury to life, limb, or health; or even one that constitutes a mere breach of the peace. If, therefore, one of the parties to a duel is injured, his consent is no excuse. Yet it is uncertain at what degree of danger the law thus takes away a man's right to consent to be placed in situations of peril (as for instance, by allowing himself to be wheeled in a barrow along a tight-rope⁵). But in the case of a surgical operation carried out by a competent surgeon, however great be the risk, there will usually be adequate cause for running it; and so the

¹ For a Submission is not always a Permission.

² But error as to a matter of law does not vitiate consent, *e.g.* imagining that a policeman has a right to strip naked a person whom he has arrested; 12 Cox 91.

³ Criminal Law Amendment Act, 1922, s. 1.

⁴ *Reg. v. Coney*, L. R. 8 Q. B. D. 534. *Supra*, p. 110. For the (disputed) effect of such consent upon the *civil* liability, see Pollock on Torts, ch. iv. s. 10; *Kenny's Cases on Tort*, p. 157; *Beven on Negligence*, i. 111.

⁵ But as to *juvenile* acrobats, see the *Children's Dangerous Performances Acts*, 1879 and 1897.

patient's consent will be full justification for what would otherwise be an aggravated assault. And even injuries which are occasioned in the course of a mere game, if it be a lawful one and be played with due care, are not regarded as causeless¹.

These rules as to the amount of violence which constitutes an assault, and as to the circumstances which will excuse that violence, hold equally good in the law of tort and in the law of crime. But those two branches of law differ in their rules as to the state of mind which will render a man liable for the exercise of such violence as has been shewn to be a forbidden act. In actions of tort, either intention or even mere negligence² (as where a waiter clumsily upsets over a customer a boiling teapot) will—if the degree of negligence be adequate—suffice to render the wrong-doer liable to damages. But an assault will not render a man liable to criminal punishment unless it were committed with actual intention³.

We have, however, seen (*supra*, p. 151) that bodily harm done by the wrongful *driving of a vehicle* may be criminal though caused by "wilful neglect" only.

The following assaults are statutory misdemeanors, punishable with the statutory penalty of imprisonment with hard labour for two years, or a fine, viz.:

1. Assault with intent to commit a felony⁴.
2. Assault with intent to prevent the lawful apprehension either of the assailant himself or of any other person⁵.
3. Assault upon a constable in the execution of his duty, or upon any person acting in aid of such constable⁶.
4. Indecent assault upon a female⁷.

Even a mere common assault is also an indictable

¹ *Supra*, p. 109. Cf. Deiser's Yearbook of 12 Ric. II. p. 125.

² *Weaver v. Ward*, Hobart 134; yet see Bigelow on Torts, 7th ed. § 374.

³ *Ackroyd v. Barrett*, 11 T. L. R. 115. Cf. *Commonwealth v. Adams*, 114 Mass. 323. In India, in the United States (Wharton's *Criminal Law*, Bk. iv. ch. VIII.), and in Scotland (Macdonald's *Criminal Law*, p. 154), negligence is similarly held to be not sufficient to make assaults criminal.

⁴ 24 and 25 Vict. c. 100, s. 38.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.* s. 52. But an indecent assault on a male, although it is only a misdemeanor, can be punished by ten years' penal servitude (s. 62).

A question arises which has caused differences of opinion. Is an indecent

misdemeanor, punishable on indictment by imprisonment for one year with hard labour, or by a fine¹.

The person assaulted has usually also the option of prosecuting the offender summarily before a court of petty sessions. For though an assault must be dealt with by indictment if it either (i) involves the title to lands², or (ii) is accompanied by an attempt to commit a felony, yet in ordinary cases of assault the offender may be summarily convicted, without a jury, before two justices of the peace. Still the maximum penalties that such a court can inflict are only:

(a) Nine months' imprisonment with hard labour; for assaulting a constable in the execution of his duty, after having been recently convicted of a similar assault³.

(b) Six months' imprisonment with hard labour, or a fine

i. of £20 for assaulting a constable in the execution of his duty⁴,

ii. of £50⁵ for assaulting a boy under fourteen, or any female; if the assault is of an aggravated nature⁶.

act essential to this offence, or does it suffice that an assault, decent in itself, was committed with an indecent aim? The former view was taken by the Supreme Court of New South Wales (*Reg. v. Culgan*, 19 N. S. W. 160); who held it not sufficient that the accused had "tried to drag" the prosecutrix to a place where he could have intercourse with her; and by that of South Africa (*Rex v. Abrahams*, C. G. H. [1918] 590). But the contrary view was adopted by the Supreme Court of Ontario (*Rex v. Chong*, 32 Ontario 66); they holding that "an indecent assault is an assault which has in it an element of indecency," even a merely mental one. I can find no English authority upon the question, except that of Lord Esher (then Brett, J.) in the case of Col. Valentine Baker (*The Times*, July 30 and Aug. 3, 1875). He took the Canadian view, by instructing the grand jury that "If a man kisses a young woman against her will, and with feelings of carnal passion and with a view to gratify his passions or to excite hers, that would be an Indecent Assault. The kisses of young people in seasons of universal gaiety are not indecent, but kisses given by a man under the influence of carnal passion are indecent."

¹ 24 and 25 Vict. c. 100, s. 47.

² *Ibid.* s. 46.

³ 34 and 35 Vict. c. 112, s. 12.

⁴ *Ibid.* Even though not knowing him to be a constable; 73 J. P. 176.

⁵ Under the Criminal Justice Act, 1925, s. 39. By this Act the offender, in (b) ii and in (c), may be also bound over.

⁶ Aggravated, not by its indecency but by its violence.

(c) Two months' imprisonment with hard labour, or a fine of £5, for a common assault. The justices in this instance can summarily convict only when the complaint has been made by (or, as in the case of children assaulted, on behalf of) the very person assaulted; and not merely by the police¹. For a resort to this summary procedure takes away the aggrieved party's right of civil action.

By 41 Vict. c. 19, any court which convicts a husband (either summarily or not) of an aggravated assault on his wife may, if satisfied that her future safety is in peril, make an order that she shall no longer be bound to cohabit with him; and may also make an order for her maintenance. The first-mentioned order will have the effect of a judicial separation². The word "aggravated," in this enactment, is not limited to the various statutory aggravations of assaults.

A striking illustration of the increased orderliness of the people, probably due to the diminution of drunkenness, is afforded by the fact that the number of petty assaults summarily prosecuted in 1923 was little more than half what it had been twenty years previously; though the population had meanwhile increased greatly. Despite a corresponding increase the number of violent robberies, which in 1857 was 625, was only 151 in 1923.

¹ But in proceedings under s. 43 for "aggravated" assaults on females or boys, the right of prosecution is not thus limited. The legislature had wife-beaters in view; and realised that injured wives are often too ready to forgive. Similarly in Ireland, where injured persons are less ready to prosecute, justices may (by 25 and 26 Vict. c. 50, s. 9) try cases of assault even when the party assaulted declines to complain.

In Cambridge, on the other hand, the Proctors and their men enjoy exemption from all summary jurisdiction of justices, in respect of assaults committed by them "in the exercise of the authority of the Proctor"; though the person assaulted may still proceed by indictment or by civil action; Cambridge Award Act, 1856, s. 7. This enactment arose from fines having been imposed upon a Proctor and two of his men, by the borough justices, on Dec. 3, 1850.

² But not of a Divorce; neither party can marry anyone. These orders have been made very freely (4476 in 1922); and have resulted in much immorality.

CHAPTER XI

ARSON AND OTHER MALICIOUS INJURIES TO PROPERTY

PASSING from crimes against the Person to crimes against Property, our discussion of the various offences which violate rights of ownership ought to begin with those groups which centre round two ancient crimes of peculiar heinousness—Arson and Burglary—whose historical importance can be traced to the peculiar sacredness which early English law attached to men's habitations. For a dwelling-house was regarded as being its occupier's "castle and fortress, as well for his defence against injury and violence, as for his repose. *Domus sua cuique est tutissimum refugium*¹." Hence to set fire wilfully to the humblest cottage is still a heinous felony; though to set fire equally wilfully to some unique picture or some priceless tapestry is at most a misdemeanor, and at common law was no crime at all.

This felony of Arson (so called from the Latin *ardeo*, I burn) was at one time punished with the terrible retaliation of death by burning². Yet to destroy a house in any other manner than by fire was not regarded by the common law as a criminal offence at all. The legislature has, however, now supplied this omission by making it a felony *riotously* to demolish a house³ and a misdemeanor *riotously* to damage⁴ one; and more generally, apart from any riot, by rendering the doing of malicious injury to any property—whether a house or not—a crime. That crime is punishable in some cases as an indictable misdemeanor and in others as a mere petty offence, according to the amount of damage done; see p. 166.

¹ *Semayne's Case* [A.D. 1604], 5 Coke 91.

² 24 and 25 Vict. c. 97, s. 11.

³ Britton, I. 41.

⁴ *Ibid.* s. 12.

Arson at common law was defined as "the malicious and wilful burning of the house or outhouse of another man." The requirement of malice suggests the remark that arson seems to have been one of the earliest crimes in which the mental element was emphasised. "At a very early time, men must distinguish between fires that are, and fires that are not, intended¹." So far back as the days of Bracton² it was already settled that "*Incendia fortuita, vel per negligentiam facta, et non malâ conscientiâ, capitali sententiâ non puniuntur; quia civiliter agitur contra tales.*"

In limiting the crime to the burning of the house of "another man," attention was concentrated on the interference with the rights, not of the owner, but of the immediate occupier. Hence, if a tenant were actually in lawful possession of a house, even though his tenancy was to last no longer than for the single day, he would commit no arson by burning the house down. And, on the other hand, his landlord (though the owner of the house) would commit arson if he burned it whilst it was still in the occupation of the tenant.

But the common law definition no longer holds good. It has been superseded by the somewhat different language adopted in various statutes dealing with arson, which are now consolidated by the Malicious Injuries to Property Act, 1861³.

Arson under this enactment is now the felony of unlawfully and maliciously setting fire to buildings or to certain peculiarly inflammable kinds of other property. The possible punishments vary. In one extremely rare class of cases arson is still (nominally) punishable with death, under statute law; viz. when it consists in setting fire to a King's ship or dock-yard⁴.

The next most heinous class of cases are those in which

¹ Pollock and Maitland, II. 491.

² Fo. 146 b.

³ 24 and 25 Vict. c. 97. See Stephen, *Dig. Cr. Law*, Arts. 417-421.

⁴ 12 Geo. III. c. 24, s. 1 (*Dockyards Protection Act*); 7 and 8 Geo. IV. c. 28, ss. 6, 7.

penal servitude for life may be inflicted; viz. the offences of setting fire to: (1) a church¹, railway station², public building³, stack⁴, coal mine⁵, or ship⁶; (2) a dwelling-house when any person is therein⁷; and (3) almost any kind of building if the act be done with intent of injuring or defrauding any person⁸. But for setting fire to any building under any other circumstances than those above mentioned⁹, or for setting fire to crops or plantations¹⁰, the maximum penalty is only penal servitude for fourteen years.

It will be seen that the statutory law of arson is far wider than was the common law doctrine. The crime is no longer confined to houses and outhouses; and moreover it may be committed even by a person who is in possession of the thing burned.

Two of the statutory phrases call for comment—the “maliciously” and the “setting fire to.”

(a) “*Maliciously.*” Burning a house by any mere negligence, however gross it be, is, as we have seen¹¹, no crime (an omission in our law which may well be considered as deserving the attention of the legislature). Even the fact that this gross negligence occurred in the course of the commission of a felonious act will not suffice to render the consequent burning-down indictable as an arson. For in any statutory definition of a crime, “malice” must, as we have already seen¹², be taken—not in its vague common law sense as a “wickedness” in general, but—as requiring an actual intention to do the particular kind of harm that in fact was done (or at least a recklessness as to doing it)¹³. Consequently, if a criminal, when engaged in committing some burglary or

¹ 24 and 25 Vict. c. 97, s. 1.

² *Ibid.* s. 4.

³ s. 5.

⁴ s. 16.

⁵ s. 26.

⁶ s. 42.

⁷ s. 2.

⁸ s. 3.

⁹ s. 6.

¹⁰ s. 16.

¹¹ *Supra*, p. 163. *E.g.* if a smoker thoughtlessly throws away his match against a stack.

¹² *Supra*, p. 148; *Reg. v. Pembliton*, L. R. 2 C. C. R. 119 (K. S. C. 157).

¹³ On the other hand it is not limited to, nor does it require, any ill-will to the person injured; cf. p. 134 *supra* and p. 169 *infra*.

other felony, negligently sets fire to a house, he usually will not be guilty of arson¹. He would, however, be so in those rarer cases where the original crime he was engaged in was itself an act of burning, such as he would know to be likely to result in producing an arson. For a man is responsible for all the foreseen consequences of his acts. Thus under the old common law, if a man by wilfully burning his own house (which *then* would not be arson), accidentally burnt the closely adjacent house of a neighbour, he might be guilty of arson; since in such a case the law would raise a *prima facie* presumption of malice from the manifest obviousness of the danger. But it must not be supposed that everyone who has maliciously set fire to some article which it is not arson to burn, will necessarily become guilty of arson if the fire should happen to spread to an arsonable building. For if a man mischievously tries to burn some chattels inside a house, and, quite accidentally and unintentionally, sets fire to the house thereby, this is not an arson of the *house*². And even if his setting fire to the chattels inside the building was intrinsically likely to result in setting fire to the building itself, he still will not necessarily be guilty of arson of it. For it is essential to arson that the incendiary either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so³.

(b) The statute speaks of "setting fire to" houses, where

¹ *Reg. v. Faulkner*, 11 Ir. Rep. C. L. 8 (K. S. C. 152).

² Not of the house; and not even of the chattels burned, for, though s. 7 does make it a felony to set fire to "*any* matter or thing" in (or against) a building, it does so only where the incendiary knows and disregards the danger to the building. *Reg. v. Child*, L. R. 1 C. C. R. 307; *Reg. v. Nattrass*, 15 Cox 73 (K. S. C. 156).

³ *Reg. v. Harris*, 15 Cox 75 (K. S. C. 154). Similarly where a prisoner, indicted (under 24 and 25 Vict. c. 100, s. 32) for maliciously obstructing a railway line with intent to endanger the safety of persons travelling thereon, was found by the jury to be "guilty of the act, but with an intent, not of causing injury, but only of gaining favour with his employers by professing to discover the obstruction," this was held to amount to a verdict of Not guilty (*The Times*, July 29, 1901).

the common law required a "burning." But this appears to be a distinction without a difference; since "set fire to" is regarded as meaning not merely "place fire against," but actually "set on fire." It will be sufficient if any part of the woodwork of the building has been charred by being raised to a red heat, even without any blaze¹; for some kinds of wood will burn away completely without ever blazing at all. But it has been held not to be sufficient that the action of the fire has scorched some of the wood to blackness, if no part of it has been actually "consumed²." Yet even a mere blackening of wood shews that the chemical constitution of its cell-walls has (as in the case of charcoal) undergone a change. There must consequently have been a "decomposition" (which is the test suggested by Sir James Stephen³), with a consequent actual loss in weight; and therefore, in fact, a "consumption" of part of the wood, though this appears to have been denied in *Reg. v. Russell*.

Arson was the only form of injury to property that was recognised by the common law as a crime. All other kinds of mischievous damage to it were merely trespasses; to which only a civil remedy was attached. But by statutory legislation, numerous provisions have been made for the criminal punishment of various forms of malicious injury to property.

Under the Malicious Damage Act, 1861 (24 and 25 Vict. c. 97), malicious injuries to various specified classes of property are rendered criminal offences of various degrees of guilt, ranging from that of felonies punishable with penal servitude for life (*e.g.* for destroying machinery used in textile manufactures, or textile goods exposed in process of manufacture⁴), down to offences punishable on summary conviction.

Malicious injuries to all other real or personal property, not included in these classes, are dealt with as follows:

(1) Maliciously causing damage is an indictable misde-

¹ *Reg. v. Parker*, 9 C. and P. 45.

² *Reg. v. Russell*, C. and M. 541.

³ *Dig. Cr. Law*, Art. 419 n.

⁴ 24 and 25 Vict. c. 97, s. 14.

meanor; and (a) when committed by night (*i.e.* between 9 p.m. and 6 a.m.) is punishable with penal servitude for five years, or imprisonment for two years, with or without hard labour¹, or a fine²; or (b) when committed by day, is punishable with such imprisonment, or a fine. But no person is to be sent for trial by indictment unless the committing justice considers the damage to exceed £5³.

(2) Maliciously, or even merely wilfully⁴, causing damage to any amount not exceeding £20 may be dealt with as a petty offence, punishable on summary conviction (a) if the damage exceeds £5, by imprisonment for three months or by a fine not exceeding £20; or (b) if it be only £5 or less, by imprisonment for two months or by a fine not exceeding £5.

Both in (1) and in (2) compensation may, in addition, be awarded to the party aggrieved⁵.

These provisions do not extend to mischief done either (a) under a reasonable supposition of right⁶; or (b) without producing any actual harm—merely nominal damage (as in walking on a gravel path) that would suffice for an action of Tort, thus not being enough. But if the damage, though slight, is quite appreciable, the statute applies. In *Hamilton v. Bone*⁷ a conviction was sustained for cutting blossom from a chestnut tree, though the blossom was only worth elevenpence. But a conviction was held impossible where persons,

¹ *Ibid.* s. 51.

² *Ibid.* s. 73.

³ 4 and 5 Geo. V. c. 58, s. 14 (2).

⁴ *Ibid.* s. 14. "Wilfulness" (*i.e.* acting "with a will") is advertent and deliberate action with knowledge that the Thing is damaged, even though there be no "malice" against its Owner. *E.g.* a dairyman waters his employer's milk, but only in order to have more to sell. *Roper v. Knott*, L. R. [1898] 1 Q. B. 868.

⁵ 4 and 5 Geo. V. c. 58, s. 14 (1). In either case the imprisonment may be either with or without hard labour; s. 16 (1).

⁶ *Ibid.* s. 14 (1). Cf. L. R. [1903] 2 K. B. 714. In Canada it has been held (7 Ontario L. R. 530), following a New Zealand decision, that the supposition excuses only when it is a mistake of Fact, not of Law; *i.e.* it must be an erroneous but honest belief in the existence of circumstances that really would, in law, have constituted a right.

⁷ 16 Cox 437.

in playing football, repeatedly trespassed into an adjoining pasture to recover the fugitive ball, yet (it being winter) did no appreciable harm to the grass thereby¹. So the familiar announcement "Trespassers will be prosecuted" is often a prophecy utterly incapable of fulfilment². But where the land to which it refers is bearing such a crop (*e.g.* mowing grass) as is capable of receiving appreciable damage from the trespass, the presence of a prohibitory notice may be important as shewing the "wilfulness"—and therefore the criminality—of a trespass committed in defiance of it³.

Moreover it must be remembered that to damage property is one thing, and to carry it off is another. Hence in *Gardner v. Mansbridge*⁴, a conviction under the Act of 1861 for plucking wild mushrooms (though to a value of as much as two shillings) was quashed; partly upon this very ground, viz. that the Act does not regard the loss to the owner, but the damage to the realty. And here the realty itself was no worse, for sections 16–24 shew that the statute treats the fruits of realty not as being a part of the realty, but as distinct from it. (In our case of plucking blossom from a tree, part, and a cultivated part, of the freehold stood visibly mutilated.) A further ground was that, as s. 24 inflicts only one month's imprisonment for taking cultivated plants, the mere general words of s. 52, which inflicts two months' imprisonment, must not be allowed to include *uncultivated* plants. Hence to take, however wilfully and maliciously, such things as fern-roots, primrose-roots, watercresses, mushrooms, sloes, hips, nuts, blackberries, when they are growing *wild*, usually constitutes no offence under this Act. Yet where, as in the case of nuts and sloes, a shrub or underwood is concerned, the plunderer will commit a punishable offence if his depredations are so effected as to involve injury to the shrub itself. In all other

¹ *Eley v. Lyle*, 50 J. P. 308.

² Cf. Pollock on Torts, ch. ix. s. 10; Maitland's *Justice and Police*, p. 13.

³ See *Gayford v. Chouler*, L. R. [1898] 1 Q. B. 316.

⁴ L. R. 19 Q. B. D. 217.

cases his act is merely a civil wrong; for, even when looked at as a theft, it will fall neither within the common law¹ (which punishes no thefts of realty), nor within the Larceny Act of 1861, which does not, even under ss. 36 and 37, protect uncultivated plants. Hence the prudence of those farmers who, in fields where mushrooms are plentiful, place some spawn here and there under the turf, and put up a notice that "Mushrooms are cultivated in this field."

We have already more than once said² that in *statutory* wrongs of malice, there must be an intention to do the particular kind of harm that actually was done. It is scarcely necessary to point out here that, as all the offences with which we are now dealing are purely statutory, this principle applies to them with full force. It is, at the same time, provided by s. 58 of the Act, that the malice need not be against the owner of the property. And indeed, it need not be against any human being at all. It is true that on the construction of a similar statute, 9 Geo. I. c. 22, which first made it a crime "maliciously to kill or wound cattle," the judges of the eighteenth century repeatedly held it to be necessary that the wound should have been inflicted from a feeling of malice against the owner of the animal; so that spite merely against the animal itself would not suffice, even where the injury to it would necessarily violate the rights of its owner³. But in a modern case a man, who had in a fit of drunken spite cruelly kicked and stabbed a horse which was his own, was indicted (under 24 and 25 Vict. c. 97, s. 40) for having feloniously and maliciously wounded it⁴. It was urged that he was only liable to be convicted of a petty offence under the Act for the prevention of cruelty to animals⁵. But it was held by Lord Russell, C.J. (after consultation with Grantham, J.), that he

¹ *Infra*, p. 198.

² *Supra*, pp. 148, 164.

³ 2 East's *Pleas of the Crown*, 1072-1074.

⁴ *Reg. v. Parry* (Chester Assizes), *The Times*, July 27, 1900. Cf. *Reg. v. Welch*, L. R. 1 Q. B. D. 23.

⁵ 12 and 13 Vict. c. 92, s. 2.

might be convicted of the felony. This extension of the idea of malice to cases of mere cruelty, in which a sentient creature is hurt but the rights of no human being are infringed, affords a striking instance of the advance which has taken place during the past century in the current ethical conception of man's duties towards the lower animals¹.

¹ The doctrine laid down in this decision as to the felony of wounding "cattle," under s. 40, will find more frequent application in the petty offence, under s. 41, of wounding any other animal that either is larcenable at common law or else is "ordinarily kept in a state of confinement or for any domestic purpose." The clause in inverted commas applies whenever the animal belongs to a species ordinarily so kept (*e.g.* cats) even though there is no proof that this individual was so kept; and also whenever there is proof that the individual was so kept, although those of its species (*e.g.* pheasants, tortoises, tigers) ordinarily are not. *Nye v. Niblett*, L. R. [1918] 1 K. B. 23. Cf. p. 222 *infra*.

Buddhist tenderness to animals causes France's Code of 1924 for the kingdom of Cambodia to impose imprisonment on any one who "uselessly" kills an elephant or horse or ox, even though it be his own property (s. 475).

CHAPTER XII

BURGLARY AND HOUSEBREAKING

IN consequence of the peculiar sanctity which, as we have seen¹, the common law attaches to even the humblest dwelling-house, capital punishment was inflicted upon those guilty of the nocturnal violation of any habitation, even when little or no injury had been done thereby to the fabric. The crime of Burglary² is committed when anyone, in the night, either (1) breaks and enters another person's dwelling-house with intent to commit a felony therein; or (2) breaks *out of* another person's dwelling-house after having either (*a*) entered it with intent to commit a felony therein, or (*b*) actually committed a felony therein. Let us consider successively the five points in this definition; the place, the breaking, the entry, the time and the intention.

(1) *The Place*. It must, now, be a dwelling-house. Yet at common law even the outer walls of a town were protected by the same penalties which safe-guarded the townsmen's actual homes. This will not surprise any one who is familiar with the Roman treatment of city-walls as *res sanctae*; or who has learned from a visit to Berwick, or York, or Chester, the importance of the defence, against private as well as public violence, which a mediæval town derived from its circumvallation³. And a reverence for religious edifices led mediæval criminal lawyers to extend also to churches the full protection of the penalties which guarded a dwelling-house—an extension for which Lord Coke offers the verbal justification that “a church is the *dwelling-house* of God⁴.”

¹ *Supra*, p. 162.

² Larceny Act, 1916 (6 and 7 Geo. 5. c. 50), s. 25.

³ The original importance of this form is illustrated by the fact that the earliest English name of the crime was “*burgh-breche*.” Its Latin name (A.D. 1200) was “*burgaria*.” See Dr Murray's Dictionary.

⁴ 3 Coke *Inst.* 64.

Much technicality has arisen in determining what buildings are to be regarded as “houses,” and when a house is to be regarded as being “dwelt” in. Clearly a house must be something more than a mere caravan or tent or booth, it must be a permanent structure. But it is not necessary that it should consist of the whole of such a structure. Thus one building may contain several dwelling-houses; each single set of chambers, or even each single room, in it may be a separate dwelling-house¹. The test of separateness is merely whether or not there is internal communication between this part of the building and the rest of it². If any one occupier’s part has no internal communication with other parts, it becomes a separate house. Conversely, a house is regarded as including its accessory buildings that stand outside its own walls, if only they (a) stand in the same curtilage³ with the house, and (b) are occupied along with it, and (c) communicate with it either directly or at least by a covered and enclosed passage⁴. So to “break” an area gate, for the purpose of gaining admittance to the house through a door in the area, is not a breaking of the house itself⁵.

But a building, although it be a “house,” is not to be regarded as being “dwelt” in unless some person habitually sleeps there⁶, and sleeps in it as his *home*. He must thus be a member of the household that occupies it⁷—whether as himself the possessor⁸ of the house or only as one of that possessor’s family or servants—and not a mere temporary licensee whose home the place is not. But though he must sleep there habitually, he need not do so invariably, *i.e.* his residence may at intervals be interrupted. For if a house-

¹ As in colleges; 3 Coke *Inst.* 65.

² *Rex v. Egginton*, 2 B. and P. 508.

³ The “curtilage” is the ground immediately round the house, such as passes upon a grant of the messuage without being expressly mentioned.

⁴ Larceny Act, 1916, s. 46 (2). Would an underground passage suffice?

⁵ *Rex v. Davis*, R. and R. 322 (K. S. C. 160).

⁶ *Rex v. Martin*, R. and R. 108 (K. S. C. 161).

⁷ *Rex v. Harris*, Leach 701 (K. S. C. 163).

⁸ Even a mere tenancy-at-will suffices; 1 Cox 261.

holder goes away from home, but with an *animus revertendi*, his house is still considered to be a dwelling, although not a single person remains in it¹.

(2) *The Breaking*. This may be either actual or constructive. It is considered as “actual” whenever the intruder displaces any part of the building or of its closed fastenings. It is therefore not necessary that there should be an actual fracture of anything. Drawing a bolt, or turning a key, or even lifting a latch will suffice. And, similarly, if a “cat burglar” climb up a rain-pipe and open a closed bedroom window, even though its sash be kept in position by nothing but its own weight, his raising the sash will amount to a “breaking².” So, too, will the raising of a cellar flap even though it be held down by nothing more than its intrinsic weight; or the turning of a swing window. Yet if a window or fanlight or door be already partly open, it will not be a “breaking” to open it still further³ and gain admittance thereby. For when a householder leaves a window or a door partly open, he gives, as it were, a visible invitation to enter; but the fact of his having left it merely unbolted is not thus conspicuous to the passers-by.

But besides these so-called “actual” breakings, in which the intruder himself displaces the fastenings of the house, the definition of burglary is interpreted as extending even to cases in which the breaking is admittedly a purely “constructive” one. Such cases may arise (*a*) where the displacement has been effected by some authorised person (some innocent member of the household), or even (*b*) where there has been no displacement at all.

In (*a*) the burglar, by force or fraud, gets some inmate of the house to open it; but, though it is thus opened to him by consent, that consent is deprived of all its ordinary legal

¹ *Rex v. Nutbrown*, Forster 76 (K. S. C. 164).

² *Rex v. Haines*, R. and R. 451 (K. S. C. 167). But what of a window opening *laterally* (a “casement”)?

³ *Rex v. Smith*, 1 Moody 178 (K. S. C. 168).

effect by the way in which it was obtained. Thus if an intending burglar gains admittance to the house by threats of violence, which put the inmates into such fear that they open the door to him, there is a constructive breaking. Or, again, if, as is more common, he rings the bell like an ordinary visitor, and then, when the door is accordingly opened to him, he comes in on pretence of wanting to speak to some member of the household, this is held to be as true a breaking as if he had himself opened the door. The fraud vitiates the consent. But if a pretence thus attempted should fail to deceive (so that, though the door be opened to the evil-doer, it is opened solely for the purpose of entrapping him), the law does not regard such an opening as being in any way *his* act, and therefore does not hold it to be, even "constructively," a breaking¹.

We have said that (*b*) a constructive breaking may also occur even though nothing whatever be displaced. This occurs where the burglar comes into the house by some aperture which, by actual necessity, is permanently left open. There is thus a sufficient "breaking" if the thief comes down into the house by the chimney²: though there would be no breaking if he came in through a window which the builders had not yet filled with glass.

It should be added that "breaking," whether actual or constructive, need not be committed upon the external parts of the house; it will be sufficient, for instance, if an inner door be "broken." And therefore if a robber gain admittance to a house by means of an open window or door, but then, when inside, proceed to unlock a parlour-door and enter the parlour, he from that moment becomes guilty of burglary³. The same

¹ *Reg. v. Johnson*, C. and M. 218 (K. S. C. 171). Contrast with this case *Rex v. Chandler*, L. R. [1913] 1 K. B. 125.

² *Rex v. Brice*, R. and R. 450. Cf. the case tried at Cambridge by Sir Matthew Hale, 1 Hale P. C. 552; and an American case (*The State v. Donohoe*, 36 Alabama 271). In the latter, the chimney proved to be of such inadequate dimensions that the burglar stuck fast in it, and it had to be pulled down to extricate him.

³ Cresswell, J., held it no *burglary* if, having thus entered only by an open

principle holds good, of course, in the case of a servant¹ or guest who, whilst resident in the house, opens and enters any of the rooms for a felonious purpose. But whether this is to be extended to the opening of the door of a mere cupboard in the wall is very doubtful. There is certainly no burglarious “breaking” in opening the door of a mere piece of movable furniture, like a sideboard or bureau.

At common law, to break *out of* a house did not amount to a burglarious breaking. But by statute² it is now provided that if a person who has committed a felony in a dwelling-house—or even has entered a dwelling-house with the intention of committing a felony—shall proceed to break out of this dwelling-house by night, he is to be held guilty of a burglary. Thus while both a breaking and an entering are still necessary, either of them may now precede the other.

(3) *The Entering.* The entry may be sufficiently made by the insertion of any part of the intruder’s own body, however small that part be. Thus a finger, or even a part of a finger³, will suffice. And there may even be a sufficient entry—without any part whatever of the man himself having come into the house—by his merely inserting some instrument which he is holding. But in this case, a subtle distinction is drawn. The insertion of an instrument, unlike that of a limb, is not regarded by law as constituting an entry, unless it were thus inserted for the purpose (not merely of entering or of breaking but) of accomplishing that ulterior felony for the sake of which the house is being broken into. Thus if a man pushes a bar through a window for the simple purpose of making a hole in the shutter, there is only a breaking, but no entry⁴. Yet if he had pushed the bar through the window for the

door, he do not enter the inner room which he breaks into; C. C. C. Sess. Pap. XL. 706. But it is an indictable nocturnal entering; p. 178 *infra*.

¹ So an innkeeper breaking into a guest’s room; like Bradford, p. 503 n. *infra*.

² Larceny Act, 1916, s. 25. *Supra*, p. 171.

³ *Rex v. Davis*, R. and R. 499 (K. S. C. 172).

⁴ *Rex v. Rush*, 1 Moody 183 (K. S. C. 174).

purpose of drawing towards him a spoon which he was going to steal, there would have been both a breaking and also an entry¹. So, again, it would be no entry to push a pistol through a window, merely in order to make an aperture to get in at. But if after having broken a window, he were to thrust a pistol through the hole, in order to shoot one of the persons in the room, this would be a sufficient entry². Perhaps the best justification that can be given for this very technical distinction as to entry by instruments, is that if the mere insertion of an instrument were always to be sufficient to constitute an "entry," most of the common acts of breaking would of themselves include an entry, whereas the definition of Burglary evidently supposes the two things to be quite distinct.

(4) *The Time*. In the earliest law, burglary might be committed in the day-time as well as at night³. But afterwards it became essential that it should take place at night. By "night" was then understood the period between sunset and sunrise⁴. Later, however, it was held not to be night if there was even sufficient sun-light to tell a man's face. This test again was discarded; and night was defined as the period between 9 p.m. and 6 a.m.⁵ As to the precise instant when that period begins and ends, it should be noted that here (as always when a reference to time occurs in an Act of Parliament or other legal instrument, without the expression of a contrary mode of reckoning), it is to be understood to be *Greenwich* mean time⁶.

To constitute a burglary, then, the breaking must always take place during this statutory night-time. And if, as is usually the case, the breaking precedes the entering, both

¹ *Rex v. Hughes*, Leach 406 (K. S. C. 173).

² 1 Anderson 114 (K. S. C. 173).

³ Pollock and Maitland, II. 491.

⁴ As in 1913 it was adjudged still to be in French law.

⁵ See now the Larceny Act, 1916, s. 46.

⁶ Except in months when the Summer Time Act prescribes sixty minutes earlier. In Ireland, *Dublin* mean time. But "sunset" and "sunrise," for lighting-up vehicles, refer to local time.

must take place at night, though not necessarily on the same night¹. But if the entry precedes the breaking, *i.e.* if the latter is not a breaking-in but a breaking-out, the entry need not be at night².

(5) *The Intent*. There must be an intention to commit some felony (*e.g.* to kill, or to commit a rape, most commonly it is an intention to steal). But it is not necessary that the felony should actually be accomplished. Moreover this intention must exist at the time of the breaking and the entering; and not arise merely after he is in the house³. Hence if people break open the front door of a house illegally, but only for some honest purpose (*e.g.* constables acting with an invalid search warrant), and then are so tempted by the sight of something inside that they steal it, they will not be guilty of any burglary⁴.

Accordingly if only a tort, or even a misdemeanor, be intended—as, for instance, to get a night's shelter⁵, or to commit an adultery or an assault—the breaking and entering for such a purpose will not be burglary, but either a mere civil trespass and no crime at all, or, if a crime; only an attempt to commit a misdemeanor. And thus, in 1770, where a man broke into a stable and cut the sinews of a horse's fore-leg in such a manner that it died, but it was shewn that his intention had not been to kill the horse (which would have been even then a felonious act) but only to maim it, so as to prevent it from running in a race, he was held not to have committed a burglary⁶. For in 1770, although killing a horse had already

¹ 1 Hale P. C. 551; *Rex v. Smith*, R. and R. 417.

² Larceny Act, 1916, s. 25.

³ But if he break out after actually committing a felony inside, felonious intent at the time of entry is not necessary.

⁴ *Rex v. Gardiner*, Kelyng 46 (K. S. C. 178).

⁵ For a quaint case where the intruder declined to quit the agreeable shelter, see 4 Cr. App. R. 41. In 1922 a charge was dismissed because the only purpose of the supposed burglars had been to see the apparitions by which the house was reputed to be haunted.

⁶ *Rex v. Dobbs*, 2 East P. C. 513 (K. S. C. 176). The stable was part of a dwelling-house.

been made a statutory felony, any lesser injury to the animal was merely a tort. At the present time it is a felony, not only to kill but, even to maim a horse¹.

The fact that the burglar actually committed some felony in the house, is excellent evidence that he broke and entered it with an intention of committing this felony. Thus if he drank some wine which he found in the dining-room, this theft would be evidence, though certainly only weak evidence, that he entered the house with intent to steal. In the great majority of cases the question of intention will resolve itself simply into Lord Beaconsfield's old antithesis of "Plunder or Blunder?" Drunkenness may be useful as evidence to support the latter alternative. But the question is not always an easy one to answer, and it often has to be determined by a somewhat weak chain of inference. Thus in 1899 a boy broke into a house while the family were away; but contented himself with winding up all the clocks and setting them going. Had he been detected before he had undertaken this comparatively innocent course of action, he might have found it difficult to rebut the inference that he had broken into the house for purposes of theft.

Under the Larceny Act, 1916, s. 25, the maximum punishment for burglary is penal servitude for life². The same enactment deals also with some statutory nocturnal offences, which are approximations to burglary, but much less heinous than it. We may mention the following:

1. Entering (*i.e.* without breaking) a dwelling-house, by night, with intent to commit felony therein, is a felony. It is punishable with seven years' penal servitude³.

2. Being found by night in any building (*i.e.* although the entry may have been effected only in the day-time), with

¹ 24 and 25 Vict. c. 97, s. 40.

² Imprisonment for two years or less may be imposed; s. 37 (4).

³ s. 27 (1). But such an entry in the day-time is not indictable at all; though there may under the Vagrancy Act be the petty offence mentioned in the next note.

intent to commit felony therein, is a misdemeanor. It is punishable with five years' penal servitude¹.

8. Being found by night in possession of housebreaking implements, without lawful excuse, is a misdemeanor. It is punishable with five years' penal servitude². Cf. p. 352 *infra*.

We have seen that burglary is essentially a nocturnal offence. To do in the day-time what it would be a burglary to do at night, was at common law a mere misdemeanor. It was known as Housebreaking. But statutory enactment has now erected it into a felony. It is identical with burglary so far as concerns the breaking, the entry, and the intention that it requires. But in some points it differs from burglary. Thus (1) it is not limited to any particular hours. An indictment for burglary must state that the offence was committed at night; but an indictment for housebreaking omits all reference to time. Again, (2) it extends to a wider range of buildings; including, besides dwelling-houses, mere shops, warehouses, etc. And (3) it admits of different maxima of punishment accordingly as the ulterior felony intended is actually committed or not. For, under the Larceny Act, 1916, it is punishable with penal servitude (1) for fourteen years, if any ulterior felony is actually committed; but (2) only for seven years, where nothing more is proved than that the breaking and entering were effected with the intent to commit some felony³. A breaking *out* will suffice in the first of these two forms, but not in the latter. In either case, instead of penal servitude, imprisonment for not more than two years may be imposed, with or without hard labour.

¹ s. 28 (4). Even in the day-time it is a petty offence, punishable with three months' imprisonment, under the Vagrancy Act, to be found in a house or an enclosed garden, for *any* criminal purpose (5 Geo. IV. c. 83, s. 4). See p. 326 *infra*.

² s. 28 (2). See p. 5, *supra*. Even in the day-time such a possession, if *with the intention of housebreaking*, would be a petty offence similarly punishable under the Vagrancy Act.

³ Larceny Act, 1916, ss. 26, 27.

We have seen (p. 171) that the old idea of burglary included a sacrilegious form, in which the place broken into at night was a church. Modern enactments have replaced this by a statutory crime of Sacrilege, which differs from that just now mentioned, (1) in being irrespective of the hour of the day, and (2) in extending to other places of worship besides those of the established religion. For, under provisions that are now consolidated in the Larceny Act, 1916, it is a felony, punishable with penal servitude for life¹, to break and enter and commit a felony in—or to enter and commit a felony in and then to break out of—“any place of Divine worship.” And it is also a felony, but punishable with only seven years’ penal servitude, to break and enter such a place with the intention of committing a felony, though without accomplishing that intention². In either case, instead of penal servitude, imprisonment for not more than two years, with or without hard labour, may be imposed.

It will readily be observed that the definitions of both burglary and housebreaking are wide enough to cover, along with acts of heinous guilt, others of a very trivial character. In 1801, Andrew Branning, a boy of thirteen (to whom three witnesses gave a good character) was sentenced³ to death for burglary, in having, after sunset but before closing-time, broken a pane of glass in a shop window and put his hand through the hole, and stolen a spoon that lay inside.

¹ s. 24.

² s. 27 (2).

³ Sess. Pap., LXXVIII. 104. Probably not *executed*.

CHAPTER XIII

STEALING

§ 1. HISTORICAL

WE now pass from the offences which consist in destroying or damaging a man's property, to those which consist in depriving him of the enjoyment of it, though probably leaving the property itself uninjured. Of such offences the most ancient in English law is Larceny¹. The rules relating to it can be traced back through a history of several centuries; and they have now become so complex as to be scarcely intelligible without a knowledge of their history.

Some seventeen hundred years ago, the jurist Paulus elaborated for Roman law a definition of the offence of Theft (*furtum*) which subsequently received legislative approval from Justinian. Bracton, more than a thousand years afterwards, embodied this definition, with some verbal alteration, in his account of English law as it then stood, in Henry III.'s reign. His words are: "Contrectatio rei alienae fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit²." ("The fraudulent dealing with another man's property against his will, with an intention of stealing it.") Bracton thus retains the wide Roman idea of theft, as including any kind of dealings (*contrectatio*) by which a dishonest appropriation could be effected. But it would seem that, in so doing, he greatly exaggerated the comprehensiveness of the English idea of theft. Here, as in all Germanic nations, that idea was too crude to go beyond punishing such dishonest dealings as took the "violent and unmistakeable form of a change of

¹ Stephen, *Hist. Cr. Law*, III. 121-176; *Dig. Cr. Law*, Arts. 304-334.

² Bracton, III. 32. 1. The words of Paulus had been "Contrectatio rei fraudulosa, lucri faciendi gratia, vel ipsius rei vel etiam usus ejus possessionisve." *Digest*, XLVII. 2. 1. 3.

possession¹.” This narrow conception was subsequently narrowed still further by various subtleties which were introduced by judicial decision. Some of these limitations would seem to us unaccountable, if we did not know that they had been inspired by motives of humanity. The desire of avoiding capital punishment—and in later times that of restricting the number of offences in which, by the old procedure in trials for felony², the accused person was denied the support of counsel and witnesses—led our mediæval judges to invent ingenious reasons for depriving many acts, that seemed naturally to fall within the definition of larceny, of all larcenous character. So extreme was the severity of the law of larceny that it exacted death as the penalty for stealing, except when the thing stolen did not exceed the value of twelve pence; see p. 219 *infra*. This severity was ultimately tempered by two active forces. One was what Blackstone³ leniently terms “a kind of pious perjury” on the part of juries; who assessed the value of stolen articles in a humanely depreciatory manner. Thus in 1808, to avoid convicting a woman for the capital offence of “stealing in a dwelling-house to the value of forty shillings,” a jury went so far as to find on their oaths that a £10 Bank of England note was worth only 39s.⁴ The other force which similarly opposed putting men to death for thefts was that ingenious judicial legislation which we have already mentioned. By it, as early as the reign of Edward III., many articles were placed outside the protection of the law of larceny on the ground of their technical connexion with immovable property, as for instance,

¹ Pollock and Maitland, II. 497. “There can we think be little doubt that the ‘taking and carrying away,’ upon which our later law insists, had been from the first the very core of the English idea of theft”; *ibid*.

² *Supra*, p. 94.

³ 4 Bl. Comm. 239.

⁴ *Rex v. Bridget Macallister* (Sess. Pap., LXXXVI. 18). Sir S. Romilly mentions another, in 1732, where a woman had stolen two guineas and two half-guineas, yet the jury pronounced the total value of the four coins to be “under 40s.” In 1823, in an indictment for stealing a guinea and a sovereign, their value was prudently placed at *ten pence*, in order to make a conviction more probable (*The Times*, Oct. 21, 1823).

title deeds to land, or even the boxes in which such deeds were kept. Again, under Edward IV., the judges declared certain acts of dishonest appropriation to be no larcenies, on account of their not involving a sufficient change of technical possession.

By these and other modifications, the legal idea of larceny came at last to be that of the crime which is committed when any person (1) takes, and (2) carries away—or when (3) a bailee appropriates—(4) another person's (5) personal chattel, (6) of some value, (7) without any claim of right, and (8) with an intention to deprive that other person of the whole benefit of his title to the chattel.

But a step towards a definition by Statute was taken in 1916 by a very valuable "Act to consolidate and simplify the law relating to Larceny triable on indictment¹, and similar offences" (6 and 7 Geo. V. c. 50). It commences by defining *Stealing*; enacting—by s. 1 (1)—that a person is to be held to "steal" when he "without the consent of the owner, fraudulently and without a claim of right made in good faith, *takes* and carries away anything capable of being stolen, with intent, at the time of such taking, permanently to deprive the owner thereof."

"Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part-owner thereof, he fraudulently *converts* the same to his own use or the use of any person other than the owner."

On this basis, a definition² of the narrower crime of "Simple Larceny" is established (s. 2); which declares it to be "Stealing for which no *special*³ punishment is provided under this Act or any other Act for the time being in force." The maximum

¹ It was left to some future enactment to deal with the thefts that are punishable only on summary conviction.

² Curiously narrow; since turning on a mere arbitrary technicality.

³ Even the words "to be punished as in the case of Simple Larceny" constitute a "special punishment"; cf. s. 37 (2). Cf. 7 C. and P. 665; 8 C. and P. 293.

punishment for this Simple Larceny is to be five years' penal servitude; together with a private whipping if the offender be a boy under sixteen. It is a felony. The Act also recognises a variety of other forms of felonious Stealing that are punishable with periods of long punishment varying up to penal servitude for life. Some of the graver of these had, before the Act, been classed together as "Compound," or "Aggravated," or "Grand," Larceny; but none of these antitheses to "Simple" appear in the Act. No definition of "Larceny," in the abstract, is given; probably it must now be "Felonious Stealing." It might seem natural to adopt for it the Act's definition of Simple Larceny. But a difficulty in so doing is raised by the fact that the marginal notes¹ of sections 5, 11, and 16 (b) of the Act apply the term "Larceny" to species of stealing which do have "special punishments," and moreover are less severely punishable than Simple Larceny.

Let us proceed to consider the various points which the definition of Stealing involves.

§ 2. THE TAKING

The Act of 1916, by requiring a "Taking" as essential to one of its two forms of Stealing, recalls the common-law rule which made a change of possession essential to larceny. Where there was no infringement of possession, *i.e.* no "trespass," there could be no larceny. Thus the definition of this felony became embarrassed with "that vaguest of all vague questions—the meaning of the word Possession²." The utter technicality of that question is illustrated by the legal theory of conjugal life. A wife is held to be one person with her husband; and therefore a possession by her is posses-

¹ For the unsettled question of the admissibility of such notes in interpreting a statute, see Halsbury's *Laws of England*, xxvii. 121.

² *Per Erle, C. J.*, in *Reg. v. Smith*, 6 Cox 554. In 1915 (*Rex v. Rasmeni*), in Johannesburg, a hand-cuffed thief ran away from the arrestors; and on being re-arrested, was prosecuted for theft of the handcuffs. The court held that there was no voluntary "taking" of them by him. Cf. p. 211 *infra*.

sion by him. Consequently an appropriation of his goods by her would not constitute a change of possession; and therefore did not at common law constitute a larceny¹. Nor did even adultery put an end to this. So if a wife went away with money of her husband's, and then met her adulterer and gave him this money, he could not be convicted of receiving stolen goods; for they had not been "stolen²." Yet if the adulterer had instead assisted her in the original taking of the goods, he could have been convicted of a larceny of them³; for then he would have taken them out of the actual possession of the husband himself. But since the Married Women's Property Act, 1882⁴, husband and wife are criminally liable for stealing each other's property, if (a) they were not living together⁵ at the date of the offence, or if (b) the property was appropriated with a view to their ceasing to live together. But when they once again are living together no prosecution can take place. Thus a wife, so long as she has no intention of ceasing to cohabit with her husband, retains even under the Act of 1916 her immunity for committing thefts of his property⁶. And even if she were to abscond from him temporarily and to take away with her some of his property, but in the expectation of ultimately returning to him and bringing it back with her, then she would commit no larceny. For she would not satisfy the final clause of the definition of the word *Stealing*; since she does not intend to deprive him of the property "permanently."

But the necessity of protecting masters against the dishonesty of their servants soon caused the judges to make an extension of the legal conception of changes of possession. It came to be held⁷ that it was sufficient if, without any

¹ *Rex v. Harrison*, Leach 47 (K. S. C. 274); *Statham, Corone* 39.

² *Reg. v. Streeter*, L. R. [1900] 2 Q. B. 601 (K. S. C. 367).

³ *Reg. v. Featherstone*, Dearsly 369 (K. S. C. 274).

⁴ Replaced now by s. 36 of the Larceny Act, 1916

⁵ They may "live together" though geographically apart; 14 Cr. App. R. 19.

⁶ *Rex v. Creamer*, 14 Cr. App. R. 19. Hence her paramour, receiving it from her *then*, does not receive "stolen" goods.

⁷ Y. B. 21 Hen. VII. Hil. pl. 21 (K. S. C. 216).

change in the actual holding of an article, there were a change in what, by a mere fiction of law, was regarded as equivalent to possession—*i.e.* a merely “constructive” possession. Thus, where a butler has his master’s plate in his keeping, or a shepherd is in charge of his master’s sheep, the *legal* possession remains with the master; and similarly the landlord of an inn retains the legal possession of the silver forks which his customers are handling at the dinner table. In all such cases—where one person has physical possession and yet the legal possession is “constructively” in some one else—the former person is not said in law to have a “possession,” but only “charge” or “custody.” If, however, he proceeds to appropriate the thing—*e.g.* if the shepherd sells a lamb out of the flock—he thereby converts his custody into a “possession” (*i.e.* into a “legal,” though not a *lawful*, possession). Accordingly by thus converting to his own use the thing entrusted to him, and thereby ceasing to hold it on that trust, the servant is regarded in law as creating a new possession, and thereby constructively “taking” the thing, so as to become as truly guilty of larceny as if he had never had it in his custody at all.

Many other cases, too, besides that of master and servant, may be found, in which the legal possession is divorced from the physical possession, and in which accordingly it would be a constructive “taking,” and therefore a larceny, for the custodian to appropriate the article to himself, though he thus actually holds it. One such case arises whenever the owner of a portmanteau delivers it to a lad to carry for him to his hotel, but accompanies the lad on his way and has no intention of relinquishing the full control over the portmanteau. Similarly where at a railway booking-office a lady handed a sovereign to a man to get her ticket for her (he being nearer than she to the office window), it was held that in point of law she still retained possession of the sovereign; consequently, when the man ran off with it, he became guilty of larceny¹. So, again, a cabman does not get legal possession

¹ *Reg. v. Thompson*, L. and C. 225.

of his passengers' luggage when he puts it on the top of his cab; hence if the passengers, on quitting the cab, left some portmanteau behind, it would be a larceny, even at common law, for him to appropriate it¹.

Recurring to the particular case of servants, it may be convenient to note here that when it is not by the master himself, but by some third person, that chattels are entrusted to a servant, they are held to be not in the servant's mere custody, but in his full legal possession. Such chattels do not—in *criminal* law (see below, p. 229)—pass into the possession of the master until they are actually delivered to him; as by the money being placed in his till. Accordingly, if the servant appropriates them whilst they are only on the way towards such a delivery, he does not commit larceny. Indeed until 1799 such an appropriation did not constitute any crime at all. But in that year a statute was passed making such conduct felonious². It constitutes the crime of Embezzlement, which we shall hereafter deal with in detail³. A dishonest servant commits embezzlement in the case of things which he has received *for* his master; though larceny in the case of those which he has received *from* his master.

§ 3. THE CARRYING AWAY

Grasping a thing is sufficient to confer possession of it, *i.e.* to constitute a "taking"; but it does not amount to an "asportation," *i.e.* to a carrying away. Thus where *A* stopped *B*, who was carrying goods, and bade him lay them down, which *B* did, but *A* was arrested before he could touch them, it was held that *A* had not committed larceny; for there had been no carrying away. But removal, the slightest removal of anything from the place which it occupies, will suffice; and this, even though the thief at once abandon the thing⁴. Thus there is a sufficient asportation in taking plate out of a chest

¹ *Reg. v. Thurborn*, 1 Den. 387 (K. S. C. 276). Cf. p. 214 *infra*.

² 39 Geo. III. c. 85.

³ *Infra*, p. 229.

⁴ Larceny Act, 1916, s. 1 (2) ii.

and laying it on the floor¹; or in shifting a bale from the back of a cart to the front; or in pulling a lady's ear-ring from her ear, even though the ear-ring be caught in her hair and remain in it². But as the Act adds³, in the case of a thing *attached*, there cannot be a sufficient removal unless it has been completely detached; *e.g.* not unless the string which ties the scissors to the counter has been cut through. The test seems to be—Has every atom left the place in which that particular atom was before? So there may thus be a sufficient carrying away even though part of the thing still occupies the place which some other part of it previously did; *e.g.* by half-drawing a sword from its scabbard, or lifting a bag part-way out of the boot of a coach⁴, or pulling a pocket-book not quite out of a man's pocket⁵.

§ 4. APPROPRIATION BY A BAILEE

Where the proprietor of an article temporarily entrusts not merely the physical but also the legal possession of it to another person, *e.g.* to a carrier, a "Bailment" arises. The temporary possessor, or bailee, was at common law not indictable for larceny⁶, for as he (unlike a "custodian") had possession—legal as well as actual—of the article, it was impossible for him to "take" it⁷. Here, again, it was the necessities of domestic life that first compelled an extension of the law. In the case of its being to one of his own servants that the proprietor of an article thus entrusted the legal possession of it, an appropriation by that servant was made criminal by statute so early as Henry VIII.'s reign⁸. But, in regard to all other bailees, the common law rule remained in force for some three hundred years longer. The judges had,

¹ *Rex v. Simson*, Kelyng 31 (K. S. C. 219).

² *Rex v. Lapier*, Leach 320 (K. S. C. 222).

Larceny Act, 1916, s. 1 (2) ii.

Rex v. Walsh, 1 Moody 14 (K. S. C. 220).

Rex v. Taylor, L. R. [1911] 1 K. B. 674.

See Pollock and Wright on Possession, pp. 160–171.

Contrast the wider sweep of the Roman law of *Furtum*, *Dig. XLVII.*
2. 52. 7.

⁸ 21 Hen. VIII. c. 7.

however, so far back as the reign of Edward IV.¹, engrafted upon it the subtle distinction that if any bailee dishonestly severed into separate parts the article bailed to him—*e.g.* by drawing a pint of beer from the cask he was carrying—he thereby put an end to that possession of the Thing, as a unity, which he held under the bailment. Accordingly a subsequent appropriation by him of any of the parts thus separated—as by his drinking the pint of beer—would amount to a “taking” of that part, and so would be larceny. This rule as to “breaking bulk” brought within the reach of punishment many cases of dishonest appropriation. And in 1691 Parliament interposed, to extend the law of larceny to lodgers who stole the furniture of the rooms that had been let to them². But it was not till 1857 that any general provision was made for dealing comprehensively with misappropriation by bailees. The statute of that year³ has since been replaced by a clause in the Larceny Act of 1916⁴, which provides that it shall be larceny for a bailee, or a part-owner, fraudulently to convert anything that is capable of being “stolen,” to the use of himself, or of any person but the owner; notwithstanding that he has lawful possession of the thing. Wide as these words seem to be, they are held⁵ to apply only, by judicial decision, to those bailments under which it is the bailee’s duty to deliver up at last (whether to the original owner or to some one else) the identical article bailed and not merely an equivalent for it. In the case by which the principle was established, *Reg. v. Hassall*, the prisoner was treasurer of a money club, and had authority to lend to its

¹ *The Carrier’s Case*, Y. B. 13 Ed. IV. f. 9, Pasch. pl. 5 (K. S. C. 223). Stephen looks upon the decision in this case as an extraordinary one; and thinks it obvious that it was a compromise intended to propitiate the Chancellor, and perhaps the King (*Hist. Cr. Law*, III. 139).

² 3 W. and M. c. 9, s. 5; see now the Larceny Act, 1916, s. 16.

³ 20 and 21 Vict. c. 54, s. 17.

⁴ s. 1 (1).

⁵ *Reg. v. Hassall*, Leigh and Cave 58 (K. S. C. 227). On the point whether the Act applies when the bailee has also a power to divest the bailor’s ownership (*e.g.* in a “sale on approval”), see *Whitehorn v. Davison*, L. R. [1911] 1 K. B. 463, *infra*, p. 242, and *Reg. v. Richmond*, 12 Cox 497.

members sums out of the club-money in his hands. He misappropriated part of this fund. It was held that he was not a bailee within the Act; since he was under no obligation to pay over to anybody the specific coins which had been paid to him. Accordingly a land-agent usually cannot be indicted under *this* clause¹ for stealing the rent he has collected. Nor can the auctioneer who sells an article for you and then absconds with its price. Before the sale he was a bailee of the article, and was bound to dispose of it according to your directions. But after the sale he does not become a similar bailee of the money which he has received for it, inasmuch as he is not bound to deliver to you the identical coins.

But the tendency is to restrict rather than to enlarge the principle of this immunity. Thus it has been held that there was a duty to deliver over the specific coins received, in some cases where at first sight it might have been supposed that the parties had not created any such obligation. Thus in *Reg. v. Aden*² a bargeman, who had been entrusted with £24 to buy a barge-load of coals, and who appropriated this money, was convicted of larceny under the statute; apparently on the ground that it was his duty to pay for the coals with the actual coins which the prosecutor had given him. And, similarly, in *Reg. v. De Banks*³, where the prisoner sold a horse for the prosecutor and appropriated the purchase-money he received, there was held to be evidence of his holding this money under such a bailment as would come within the statute. (There is nothing unreasonable in making such a bailment, even of a "fungible" thing like money. It has even been said, and by judges so eminent as Lord Wensleydale and the late Mr Justice Willes, that *whenever* a servant receives money for his master from anyone he is bound to hand over the very same coins that he received⁴.)

¹ But see *another* clause—s. 20 (1) iv.—*infra*, p. 236.

² 12 Cox 512.

³ L. R. 13 Q. B. D. 29.

⁴ L. and C. 62. Cf. K. S. C. 177.

But¹ whilst Aden or De Banks was a mere bailee of a fixed sum which he had only to hand over, Hassall's club-money was left in his hands as a fund which he had to deal with, so that he was a trustee of it, with complex duties to discharge.

It should be noticed that the idea of bailment is not confined to cases where the article has been in the bailor's own possession before it was delivered to the bailee². Thus if a vendor of goods deliver them to a carrier for conveyance to the purchaser, it is the latter that is regarded in law as the bailor; for the vendor, who actually handed them over to the bailee, is regarded as having done so only as an agent for the purchaser³. It must also be noticed that bailment requires nothing more than simply a delivery upon a trust. Hence, though there is usually also a contract, express or implied, to fulfil this trust, there may quite well be a bailment even where no such contract can exist, as when goods are delivered to some person who is incapable of contracting. Accordingly, if an infant hires furniture, though no valid contract of hiring may arise⁴, he nevertheless becomes a bailee. Consequently, if he proceeds to sell the furniture, he will be guilty of larceny⁵.

Before a bailee can be convicted of larceny, it must be clearly shewn that he has really converted to his own use the article entrusted to him. Only some act of conversion that is quite inconsistent with the bailment can amount to a sufficient appropriation. In the case of a bailment of silver forks for use, melting them down would of course always be evidence of a conversion; and so would selling them, or dishonestly refusing to return them when asked for⁶. But as to pawning, a distinction must be drawn. If the bailee can shew that when he pawned the goods he honestly intended to redeem them subsequently (which might very well be

¹ *Reg. v. Governor of Holloway Prison*, 18 Cox 631 (K. S. C. 229).

² See *Reg. v. Bunkall*, L. and C. 371 (K. S. C. 231).

³ Benjamin on Sales, Book I. Part I. ch. IV.

⁴ Anson on Contracts, Part II. ch. III. s. 2.

⁵ *Reg. v. Macdonald*, L. R. 15 Q. B. D. 323.

⁶ *Rex v. Wakeman*, 8 Cr. App. R. 18.

made out by instances of his previous similar conduct), and can also give proof of there having been a full prospect of his getting money enough to carry out this intention, the pawning will not amount to a conversion¹. But if he had merely a vague intention to redeem the goods at some future time in case he should happen to become able to do so, then he clearly acted in a manner quite inconsistent with his duties as bailee, and so became guilty of larceny². When once a bailment has come to an end, and the article bailed has returned into the possession of its proprietor, no contracts subsequently made about it by the ex-bailee—such, for instance, as a bargain by him to sell it—can amount to a conversion³. This seems obvious enough; but a student may be apt to overlook it by failing to trace the changes in the legal possession.

It is desirable to notice that there does not exist, as seems sometimes to be supposed, a specific offence entitled “larceny by a bailee.” The statute⁴ places Conversion by a bailee on the same footing as a stealing by Taking; so that an indictment for it need not even contain the word “bailee.”

§ 5. THE OWNERSHIP

Things which do not belong to any determinate possessor⁵ cannot be the subjects of larceny. One conspicuous example of such things is a human corpse, and accordingly the “resurrection men”—who, in the days before the Anatomy Act⁶, used to violate churchyards in order to supply the dissecting-rooms with “subjects”—committed no larceny in taking the

¹ As where a solicitor, to whom a valuable watch was intrusted by a client, pawned it simply to secure its safe custody; C. C. C. Sess. Pap. CXLV. 420. But it may be a petty finable offence of “Unlawful Pawning”; 35 and 36 Vict. c. 93, s. 33. And the loss of control is an actionable breach of his contract.

² *Reg. v. Medland*, 5 Cox 292 (K. S. C. 236). Cf. p. 212 *infra*.

³ *Reg. v. Jones*, C. and M. 611 (K. S. C. 237).

⁴ *Supra*, p. 183.

⁵ With such a possession as would support an action of trespass; 2 Den. 451.

⁶ 2 and 3 Wm. IV. c. 75.

bodies. (It was otherwise if they carried off a coffin or grave-clothes; for these remained the property of the executors who had bought them.) But a consequent question, of much practical importance though still unsettled¹, is whether the rule of law must further be taken to be that "once a corpse, always a corpse"; for, if so, the protection of criminal law will not extend even to skeletons and similar anatomical preparations on which great labour has been expended², or to ethnological collections of skulls or mummies brought to this country at great cost.

Even an article that has an owner may come to be intentionally abandoned by him³, and of such "derelict" articles there can be no larceny⁴. Thus abandoned wrecks⁵, and treasure-trove that has no longer any owner, are incapable of being stolen⁶, until after they have been taken possession of by the Crown, or by some person to whom the Crown has granted the franchise of taking them⁷.

Animals *ferae naturae*, straying at large, form the most important of all the classes of things which have no owner. Even the (so-called) property *per-privilegium*, which the lord

¹ See the conflicting judgments in *Doodward v. Spence*, 9 New South Wales Rep. 107. From the decision, *recognising* ownership, the Judicial Committee refused leave to appeal.

² Stephen, *Dig. Cr. Law*, Art. 318. But any metal inserted, *e.g.* wiring, would of course be larcenable. Cf. a dog's collar, *infra*, p. 202.

³ As in the case of coal dropped from overloaded carts or barges. Cf. L. R. [1894] A. C. at p. 532.

⁴ 2 Bl. Comm. 9; *Reg. v. Peters*, 1 C. and K. 247; *Reg. v. Reed*, C. and M. 307; Justinian's *Digest*, XLVII. 2. 43. 9.

⁵ Whales cast ashore are "wreck."

⁶ 22 Lib. Ass. 95, 99; Williams' *Personal Property*, 52 n^a.

⁷ A curious question arises as to the rations supplied to a seaman but not actually consumed by him. Ridley, J., held that the supplying does not forthwith make them his; so he may commit larceny by saving them to sell or give away. Cf. 35 T. L. R. 381. For the safety of the ship "a man can't be allowed to starve himself in order to have an unconsumed surplus"; C. C. C. Sess. Pap. CLIII. 561. Cf. the Army Order of Sept. 1915, making rations "the property of the State until consumed." See 13 Cr. App. R. 22.

⁸ *Ferae*, here, is of course an adjective. Yet people talk about "hunting our *ferae naturae*"; and both Sir Walter Scott (*Antiquary*, ch. XXII.) and Sir W. H. Rattigan (*Jurisprudence*, p. 138) have fallen into like error.

who has a chartered park or forest is regarded by law as having over certain of the wild creatures in it, is not a sufficient ownership to sustain an indictment for larceny¹; for it is not so much an ownership as a peculiar right to obtain ownership. For the general principle of law is that all true ownership of living things depends upon actual control over them. Domestic animals (such as horses, oxen, sheep), or domestic fowls (such as hens, ducks, geese), usually have a settled home, and so come under the control of its occupier; and consequently are larcenable. If they are so, their eggs and other produce will equally be larcenable; and this even when the produce is stolen directly from the living animals themselves (as by milking cows, or plucking wool from the backs of sheep), before the true owner has ever had possession of it as a separate thing. But over animals that are of a *fera natura* there is usually no control, and therefore no ownership. Ownership over them whilst uncontrolled, if it were to exist, could exist only in the owner of the land where at any moment they were; and it would be futile to recognise any such mutable ownership, which the animal itself might vary from hour to hour². But a power of control may of course be created; either *per industriam*, by their being killed, or caught, or tamed³, or *propter impotentiam*, by their being too young to be able to get away. Consequently larceny may be committed of pheasants which have been shot, or deer which have been so enclosed in a park that they may be taken at pleasure⁴; or of fish in a tank, or even at large in a mere pond, though not when at large in a running stream⁵.

¹ 7 Coke Rep. 17 b.

² Rather on this account, I think, than on that of their being (as Prof. Christian maintains) part of the realty (see p. 198 *infra*), it is not larceny for anglers to take earthworms out of another man's land; though it is larceny to take them after he has collected them into a pot for sale; Christian's *Game Laws*, p. 79. It is larceny to take oysters from an oyster-bed actually owned by another person; oysters having neither will nor power to stray from it. Cf. the Sea Fisheries Act, 1868, § III. s. 51.

³ *Rex v. Rough*, 2 East P. C. 607 (K. S. C. 250).

⁴ 1 Hale P. C. 511.

⁵ *Ibid.* At Cambridge in 1627, before Harvey, J., two men were convicted of larceny for taking fish out of a net lying in the river.

Again, young partridges reared under a barndoor fowl and not yet old enough to leave her protection¹, are the subjects of a true ownership, and so are larcenable².

The degree of physical control which is necessary to establish ownership will vary with the habits of the particular species concerned. Creatures may be subjects of ownership although they are not closely confined but are allowed to wander away from home, provided they have a settled habit of returning thither; and this will be so although they are not shut up even at night³. Peacocks, ducks, geese, and pigeons readily acquire this *animus revertendi*; unlike pheasants and partridges. This rule, that the taking of ownerless things⁴ cannot be a larceny, still holds good; but the modern statute-law has created many offences of dishonesty which it has not erected into larcenies. And thus deer-stealing⁵, the taking of hares or rabbits in warrens in the night-time⁶, and the taking of fish from private waters⁷, have been made offences; but they vary greatly in their degrees of heinousness as well as in their punishments⁸.

It is important to notice that larceny requires not only an ownership, but an ownership which already existed before the act of taking. A proprietorship that was created only by that very act will not suffice. Thus, although rabbits or wild pigeons, on being killed by a trespasser, become the property of the owner of the land where they are killed⁹, yet if this trespasser who kills them should proceed to carry them away, he will not¹⁰ commit larceny thereby. For the ownership

¹ *Reg. v. Shickle*, L. R. 1 C. C. R. 159 (K. S. C. 251). But the young, or the eggs, in a wild bird's nest are not in the landowner's Possession; and so, though his, are not larcenable; *Rex v. Stride*, L. R. [1908] 1 K. B. 617; overruling *Lambard*, fo. 274. Cf. *Rex v. Clinton* (Irish Rep. 4 C. L. 6), as to seaweed washed ashore

² Y. B. 18 Edw. IV. fo. 8, pl. 7 (K. S. C. 249). Cf. 7 Coke 17.

³ *Reg. v. Cheafor*, 2 Denison 361.

⁴ Larceny Act, 1916, s. 1 (3). Cf. *The Case of Peacocks* (K. S. C. 250).

⁵ 24 and 25 Vict. c. 96, ss. 12-15.

⁶ *Ibid.* s. 17.

⁷ *Ibid.* s. 24.

⁸ *Infra*, p. 222.

⁹ *Blades v. Higgs*, 11 H. L. C. 621.

¹⁰ *Reg. v. Townley*, L. R. 1 C. C. R. 315 (K. S. C. 255); p. 199 *infra*.

which he infringes did not exist before he killed the creatures. (The Larceny Act, 1916, s. 1 (3) *b*, preserves this common-law doctrine that "The carcase of a creature wild by nature, and not reduced into possession while living, shall not be capable of being stolen by the person who has killed such creature; unless, after killing it, he has abandoned possession of the carcase.") But if, after killing them he should go away and leave them on the land, with the idea of abandoning them altogether, he would thereby cease to be their possessor, and they would pass into the legal possession of the owner of the soil¹. So if the trespasser should afterwards change his mind and come back and seize them again, this would be an entirely new act of taking. And, as the things had now got an owner, it would be a larceny. Where a man, employed to trap rabbits, put some into a bag in order to appropriate them, and a keeper (suspecting him) nicked them during his absence, for purposes of identification, it was held that the nicking was not sufficient to reduce them into the possession of the keeper or of his master. Hence the trapper did not become guilty of larceny by carrying them away, even when thus nicked².

But though there can be no larceny of things which have no owner at all, there may be a larceny although the owner is unknown and undiscoverable; as in the case of brass plates being stolen from very old coffins in a vault. It is well, however, to bear in mind Sir Matthew Hale's caution never to convict any person of having stolen from a supposed but unknown owner, merely because he has been found in possession of property under suspicious circumstances and will not give an account of how he came by it³. Even if a tramp is found to have six gold watches in his pocket, he ought not to be treated as a thief until some definite proof can be obtained of their having actually been stolen somewhere. His possession is *primâ facie* evidence of ownership (*infra*, p. 333); and

¹ Cf. *Reg. v. Foley*, L. R. (Ir.) [1889] C. L. 299 (K. S. C. 241).

² *Reg. v. Petch*, 14 Cox 116.

³ Hale 2 P. C. 290 (K. S. C. 467). Cf. 26 T. L. R. 265.

his silence, or even his giving an unsatisfactory account, does not rebut this evidence so strongly as to justify a conviction for larceny. See p. 343.

But though there can only be a larceny where the thing (at the time of being stolen) already "belonged" to some other person, it is not necessary that this person should be a sole owner, or even a full owner. (a) He may, for instance, be merely a joint-owner with the thief himself. At common law, as every co-owner is lawfully entitled to the possession of the whole thing, he could not commit larceny by taking it. But now, by the Larceny Act, 1916, s. 1 (1), a part-owner "may be guilty of stealing a thing, notwithstanding that he has lawful possession thereof; cf. s. 40 (3). (b) And by it—s. 1 (2) iii—the person stolen from may be one who is even less than a co-owner, merely some "person having possession or control of, or a special property in," the thing stolen; *e.g.* a mere bailee (or even a thief who himself had stolen it; see 10 Cushing 397).

Consequently, paradoxical as it may seem, a man may commit larceny by stealing his own property. For when an owner of goods has delivered them to anyone on such a bailment as (like those of pawn and of hire) entitles the bailee to exclude him from possession¹, that owner may become guilty of larceny, even at common law, if he carries them off from this bailee with any intention to defraud him. He might, for instance, aim at defrauding him by making him chargeable for the loss; or by depriving him of an interest which he had in retaining his possession, such as the lien of a cobbler upon the boots which he has mended, for the cost of the mending. Possibly it will suffice even though the intention was to defraud (not the bailee but) some other person; as where the owner of goods, which are in a bonded warehouse, surreptitiously takes them out, in order to cheat the Crown of the customs-duty payable on them². An old illustration

¹ Williams' *Personal Property*, Part I. ch. I. § 2. 2.

² *Rex v. Wilkinson*, R. and R. 470 (K. S. C. 253).

was that¹ of a man who sent his servant on a journey in charge of some valuables, and then disguised himself as a highwayman and robbed the servant of these things, in order to claim their value from the inhabitants of the Hundred (under its ancient liability to make good the loss sustained by a crime of violence committed within its boundaries). But Mr Justice Wright² questioned whether the owner of a thing can commit any larceny of it by taking it away from a mere bailor *at will*, such as his own messenger would be.

§ 6. THE SUBJECT-MATTER

Some of the very early Roman lawyers had thought there might be *furtum fundi locive*, i.e. that land was legally capable of being stolen. But, even before the time of Gaius, all the jurists came to abandon this view. No one ever held it in England. For, since a larceny could only be committed by carrying a thing away, this clearly made it essential that the thing should be movable. Moreover, just as we have seen that some other person's ownership over the thing must exist before the act of theft, and not merely be created by it, so this movableness of the thing must also have existed before the theft. A thing therefore was not larcenable if it first became movable by the very act of the taking. Thus it is no theft at all to take mould from a garden or sand from a pit; or to pull down a wall³ and carry away the bricks. So it was no larceny to strip woodwork or other fixtures from a house, or to cut down a tree⁴; but these acts have now been made specific statutory offences⁵. Hence if a man demolishes some one else's house and sells the materials, he may be proceeded against in respect of the fixtures. The Larceny Act, 1916, s. 1 (3) *a*, preserves the rule that (with some exceptions as to

¹ 2 East P. C. 654. (K. S. C. 260.)

² Pollock and Wright on Possession, pp. 165, 228. Cf. Bishop's *Criminal Law of U.S.A.*, 8th ed. II. § 790.

³ But this is a crime of Malicious Damage; *supra*, p. 166.

⁴ *The Forester's Case*, Y. B. (Rolls Ser.) 11 and 12 Edw. III. 641 (K. S. C. 238). Cf. *Reg. v. Pinchbeck* (K. S. C. 355).

⁵ Larceny Act, 1916, s. 8. Often *felonies*.

fixtures, growing plants, and mineral ores) "anything attached to or forming part of the Realty shall not be capable of being stolen by the person who severs the same from the Realty; unless, after severance, he has abandoned possession thereof." For, even at common law, there would be a larceny if, after the severance had once been fully completed, the thing were abandoned by the thief but he afterwards changed his mind and returned and carried it away. On this point *Townley's Case*¹ may again be referred to, as shewing how a poacher who shot rabbits and hid them in a ditch, and then went away, nevertheless retained "possession," during that interval of personal absence, by mere continuousness of intention. It will be instructive to a student to compare this decision with the case of *Reg. v. Foley*². In the latter case a trespasser mowed some grass, but left it where it fell; then, after two days, he returned and took it away. It was held by the Irish Court for Crown Cases Reserved that, even if he had a continuous intention, there was not a continuous possession; and, therefore, that his ultimate removal of the grass constituted a larceny. If this case be regarded as at variance with that of *Townley*, the latter is of course the one to be followed by English courts. But the two may be reconciled if it be thought right to lay stress on the distinction that *Foley*, before leaving the hay, had not performed any unequivocal act of taking possession of it; such as *Townley* did perform by hiding the rabbits.

It seems strange that land, by far the most important form of wealth in the middle ages, should have been left unprotected by even our early criminal law³. The omission, however, as Sir James Stephen⁴ points out, is rendered more intelligible by the fact that in ordinary cases it is nearly

¹ L. R. 1 C. C. R. 315 (K. S. C. 255). *Supra*, p. 195.

² L. R. (Ir.) [1889] C. L. 299 (K. S. C. 241).

³ Hence water in a pond—often carried off copiously by roadmen for steam-rollers—is not larcenable; but it would become so when severed, as by being pumped into a cart. In 1900 the East London Waterworks prosecuted a man for stealing 900,000 gallons of their water.

⁴ *Hist. Cr. Law*, III. 126.

impossible to misappropriate land without resorting to some act which itself is criminal, such as personation or forgery¹. But a dislike to capital punishment was probably the reason why the judges went still further, and excluded from the scope of larceny even things that really were movable and had only a technical connexion with the land; as when they held it to be no crime to carry off dung which had been spread upon a field². Moreover, even standing corn and similar growing crops, although the law of property gives them to a deceased owner's executors as chattels personal, were held in criminal law to savour so far of the realty as not to be larcenable³. Yet, on the other hand, some things which do not thus go to the executor, but to the heir, are larcenable; *e.g.* some species of heirlooms. It has similarly been held in an American case⁴ that though, by a very reasonable rule of law, the keys of a house always pass along with it on any alienation (whether by death or by conveyance), this legal identification of them with the realty does not go so far as to prevent its being a larceny to steal them.

In general, however, the rule of immobility extends to all things which any legal fiction identifies with the land⁵, even though they be physically movable. It was the case, for instance, with title deeds⁶; they would not pass under a grant of "all my goods and chattels": so they were not larcenable. And a sealed-up box, inclosing such deeds, was once held to be so identified with them as itself to become not larcenable⁷. (An additional reason has been given for this non-larcenability of title deeds; namely, that their value is so indefinite that it was impossible to say whether or not

¹ Though not when a visitor to Dartmoor carries off stones from a hut-circle to decorate his front-garden.

² *Carver v. Pierce*, Style 66 (K. S. C. 238).

³ 3 Coke *Inst.* 109.

⁴ *Hoskins v. Tarrance*, 5 Blackford 417 (K. S. C. 239).

⁵ Thus a villein was so identified; and consequently, though saleable, he was not larcenable; 3 Coke *Inst.* 109.

⁶ 1 Hale P. C. 510; Stephen, *Hist. Cr. Law*, III. 138.

⁷ Y. B. 10 Ed. IV. fo. 14, pl. 9; Dalton, c. 156, s. 8.

they were worth more than 12*d.*; cf. p. 219 *infra*. For a still better reason—Identification with the right they evidence—see p. 202 *infra*.) But *now* under s. 7 (1) of the Larceny Act, 1916, it has been made a statutory felony to steal documents of title to land¹; thus abolishing the fiction.

It may here be convenient, if not strictly relevant, to mention that, even at common law, gas is larcenable²; and that it is a statutory felony³ to “maliciously or fraudulently abstract, cause to be wasted or diverted, consume, or use, any electricity⁴.”

§ 7. THE VALUE

A thing is not stealable, at law, unless it⁵ “has value.” “De minimis non curat lex.” Otherwise it would, as Lord Macaulay says, be a crime to dip your pen in another man’s inkstand, or to pick up acorns in his garden to throw at a bird⁶. But the exact measure of this value has never been fixed. Its indefiniteness gave scope for the humane ingenuity of the judges. Hence many things in which a legal property existed, and which were of such appraisable importance that damages could have been recovered in a civil action for taking them away, were held to be below the minimum of value that was necessary to support a conviction for the felony of larceny. A vivid illustration is afforded by the fact that at one time it was doubted whether even diamonds and other precious stones, if unset, had any such intrinsic worth as to be larcenable, “because they be not of price with all men; however dear and precious some do hold them⁷.” It became

¹ As it also is one to *destroy* them; 24 and 25 Vict. c. 96, s. 28.

² *Reg. v. Firth*, L. R. 1 C. C. R. 172.

³ Larceny Act, 1916, s. 10.

⁴ A man was accordingly convicted who had put a wire into his land and tapped (in order to light his house) the waste electricity which had been allowed to run into the earth at neighbouring works. But might he not have urged that it was derelict (p. 193 *supra*)?

⁵ Larceny Act, 1916, s. 1 (3).

⁶ Note N, to his Indian Penal Code.

⁷ Hales, J., A.D. 1553; cited by Lambard, p. 275. Lambard himself enumerates as larcenable “horses, mares, colts, oxen, kine, sheep, lambs, swine, pigs, hens, geese,” etc. He does not mention goats.

clearly settled that the law of larceny affords no protection for such animals as serve neither for draught nor for food¹. Hence clearly there was no crime in stealing cats, ferrets², monkeys, nightingales, parrots, or canaries. The principle was applied even to dogs; for “a man’s two best friends—his wife and his dog—were singularly disregarded by the old common law³.” (Yet, for taking a dog, damages could be recovered in a civil action even in very early days⁴, and it was never denied that stealing a dog’s collar, or even stealing the dressed skin of a dead dog, would amount to larceny.) Bees, however, though themselves inedible, were a source of food, and consequently were held⁵ to be larcenable; and the law similarly protected the hawk when tamed, “in respect of the nobleness of its nature, and its use for princes and great men⁶.” A statutory protection, however, though less stringent than that of larceny, has been given in modern times to every animal or bird that is ordinarily kept for domestic purposes, or even kept in confinement⁷.

The rule which made value essential to larcenability was extended artificially by a fiction which identified the documentary evidence of any right with the right itself, so that if the subject of the right could not be stolen the document could not be. “The accessory must follow its principal.” We have already noticed one application of this rule, the case of the title deeds of real property. The same rule was applied to documents which were evidence of the right to any mere chose in action⁸, e.g. such instruments as a promissory note,

¹ 1 Hale P. C. 512.

² *Rex v. Searing*, Leach 350 (K. S. C. 244).

³ Ingham’s *Law of Animals*, p. 57.

⁴ Y. B. 12 Hen. VIII. 3. Manwood (*Forest Laws*, p. 99 A.D. 1598) speaks of even mortgages and pledges of dogs, as if quite frequent. Yet the civil action has recently been refused in America, in deference to the old rule of larceny; see 75 Georgia 444.

⁵ *Hannam v. Mockett*, 2 B. and C. at p. 944. A swarm from my hive remains mine until I abandon the intention to pursue it.

⁶ 1 Hale P. C. 512.

⁷ *Infra*, p. 222. The individual must be so kept; the species need not.

⁸ Dalton, 501; cf. Williams’ *Personal Property*, Intro. § 3. But note also p. 222 (2) *infra*.

or even a contract for the sale of a quantity of unascertained goods; their character as pieces of paper was "absorbed" (Dearsly 334). But a document of title to specific goods, which themselves were larcenable, was itself larcenable; *e.g.* a pawnbroker's duplicate¹.

Now, however, under the Larceny Act, 1916, s. 46 (1), "*all* deeds and instruments relating to, or evidencing, the title or right to any property" [real or personal] "or giving a right to recover or receive any money or goods" are capable of being stolen. And the stealing will be a Larceny: sometimes Ordinary, sometimes Aggravated. The reason why the thief of title deeds could not be indicted for simply stealing so much parchment was certainly not the mere smallness of the intrinsic value of the parchment or paper; for an indictment for the larceny of merely "a piece of paper" is good, and counts so expressed are habitually inserted in indictments for stealing post-office letters. Accordingly convictions have taken place for the larceny of proof-sheets², of cancelled bank-notes³, of a worthless cheque⁴, and of a small slip with memoranda pencilled on it⁵. Indeed the principle is now distinctly laid down that although, to be the subject of a Stealing, a thing must be of value to its owner, if not to other people, yet this need not amount to the value of the

¹ *Reg. v. Morrison*, Bell 158.

² A proof-sheet containing secret information (*e.g.* a telegraphic cipher code, or the forthcoming annual report of the Directors of a Company) might have very great pecuniary value to certain persons. See in C. C. C. Sess. Pap. XLIX. 179, a trial for stealing from the Colonial Office a despatch, whose premature publication by the thief rendered futile (Morley's *Gladstone*, Bk. iv. ch. x.) Mr Gladstone's mission as Lord High Commissioner to the Ionian Islands. Still greater political confusion was caused in 1878 when a Foreign Office copyist disclosed to the *Globe* the secret Anglo-Russian agreement which Lord Salisbury had signed. Still the copyist had not "taken" the documents but had merely copied one and memorised the other. This was no offence, as the Official Secrets Act had not been passed then (*Annual Register*, 1878, p. 67).

³ *Rex v. Clark*, R. and R. 181. A telegram; C. C. C. Sess. Pap. CLIII. 451.

⁴ *Reg. v. Perry*, 1 C. and K. 729 (K. S. C. 245).

⁵ *Reg. v. Bingley*, 5 C. and P. 602. That the owner carried it in his pocket affords evidence of its being of some value to him.

smallest coin known to the law, or of even "the hundredth part of a farthing¹." In *Reg. v. Clarence*, Mr Justice Hawkins went so far as to say, though only incidentally, that stealing a single pin would be larceny (L. R. 22 Q. B. D. 23).

To have omitted from the definition of Stealing all reference to the element of Value would have been to make the Act of 1916 alter some established points of law. But it must frankly be admitted that the word, thus retained in the definition, must be understood in some sense which is neither a natural nor even a precise one².

§ 8. THE CLAIM OF RIGHT

If property is taken by legal right, obviously no wrong, either civil or criminal, is committed by taking it. But in criminal law immunity is carried still further. An act of taking will not amount to Stealing unless it be committed not only without a legal right, but without even any appearance (or, in the old phrase, "colour³") of a legal right. So the ordinary *mens rea*, quite compatible with an honest ignorance of law⁴, does not suffice to constitute guilt in cases of Stealing. For any "claim of right, made in good faith⁵," if at all reasonable will suffice to deprive the taker's act of any larcenous character; *e.g.* a mistake of Law as to the rights of a Finder or of a Poacher⁶. It is a question of fact, for the jury, whether the goods were taken with such a belief or not. But there is high authority for saying that "If there be in the prisoner

¹ *Reg. v. Morris*, 9 C. and P. 349, *per* Parke, B.

² Bishop (II. § 57. 9) treats the rule as quite obsolete in America.

³ Under the colour of commending him
I have access my own love to prefer.

Two Gentlemen of Verona, IV. 2.

⁴ *Supra*, p. 68.

⁵ Larceny Act, 1916, s. 1 (1). Cf. p. 167 *supra* as to malicious damage.

⁶ C. and M. 306; 3 C. and P. 409. It is held in New South Wales (*Rex v. Nundah*, 16 N. S. W.) that the claim, if honest, need not even be reasonable. But in the United States the belief, during the Civil War, that a person whose property had been appropriated by a rebel could legally reimburse himself by taking the property of any other rebel, was held to be too unreasonable an error of law to afford a defence; *Lancaster v. The State*, 3 Coldwell 339.

any fair pretence of property or right, or if it be brought into doubt at all, the court will direct an acquittal¹." The best evidence that there was actually a sincere claim of right is that the goods were taken quite openly². A surreptitious taking, or a subsequent denial of the taking, or a concealment of the goods, suggests a felonious intent.

The following instances may be mentioned in which the carrying off of some one else's goods will be unpunishable, on account of their being appropriated under a *bond fide* claim of right.

(1) Where something is seized by a landlord in a distress for rent; even though he be mistaken in thinking that any rent is due, or even though the article seized be one which is privileged by law from being distrained on.

(2) Where corn is taken by a gleaner, honestly and openly, in a locality where gleaning is customary³.

(3) Where the taker believes that the owner has abandoned the thing; or that what he is taking is his own property⁴; or that it is something which he has a right to take⁵, whether as an equivalent for his own property⁶ or with a view to mere temporary detention (*e.g.* by way of lien).

§ 9. ABSENCE OF OWNER'S CONSENT

The Act of 1916, s. 1 (1), preserves the rule⁷ that a thing is not stolen unless taken "without the consent of the owner," or of his duly authorised agent⁸. Upon this point a question

¹ *East, Pleas of the Crown*, 659.

² *Rex v. Curtiss*, 18 Cr. App. R. 174; *Causey v. The State* (K. S. C. 281).

³ Russell on Crimes, 8th ed. p. 1174.

⁴ *Rex v. Hall*, 3 C. and P. 409 (K. S. C. 280); cf. 3 Cr. App. R. 92.

⁵ Even claims under a reprehensible practice, if it be commonly prevalent, may suffice; *e.g.* where sergeants, in weighing out the regimental meat, used to appropriate a certain percentage of it; *Rex v. Daniels* (*The Times*, Feb. 9, 1915).

⁶ *Reg. v. Boden*, 1 C. and K. 305 (K. S. C. 282).

⁷ *Rex v. Macdaniel*, Foster 121 (K. S. C. 259).

⁸ Thus an agent, duly authorised to transfer ownership, commits no larceny if he appropriates the article; *Folkes v. King*, L. R. [1923], 1 K. B. 282.

of practical importance often arises in consequence of the plans laid by the police for the detection of a suspected thief. If, for mere purposes of detection, the owner of goods acquiesces in a thief's carrying them off, does such a consent suffice to prevent the thief's act from being a larceny? We have seen (p. 174) that, in burglary, an entry permitted, after an *unsuccessful* attempt to deceive, does not amount to a constructive breaking. Similarly in larceny, if the owner desired that the thief should actually remove his goods, or, still more, if he had employed someone to suggest to the thief the perpetration of the theft, his action would constitute a sufficient consent to render the taking no larceny, although his sole object was to secure the detection of the offender. Yet if he went no further than merely to facilitate the commission of the theft (*e.g.* by allowing one of his servants to assist the thief), such conduct would no more amount to a consent than if a man, knowing of the intention of burglars to break into his house, were to leave one of the bolts on the front door unfastened.

But the owner's consent must of course be a true consent—a free and a full one¹. Thus it can afford no defence where it is obtained from him by Intimidation. In such a case his will is overborne by compulsion; as where the keepers of an auction-room forced a woman to pay for some lots which she had not bid for, by threatening that she should not be allowed to leave the room until she had so paid². Much more frequent than intimidation, however, is Fraud; which is equally effective in removing all exemptive character from an apparent permission. Consent obtained by fraud is not a true consent. Hence wherever an owner's consent to the taking of his goods is obtained *animo furandi*, the deception vitiates the consent. The taker is accordingly guilty of "larceny by a trick³."

¹ Larceny Act, 1916, s. 1 (2) i (a) and (b).

² *Reg. v. McGrath*, L. R. 1 C. C. R. 205 (K. S. C. 262). Contrast 4 F. and F. 50. See *Rex v. Hilliard*, 9 Cr. App. R. 174, on theft by drugging.

³ A common offence; but often puzzling, even to experts. See L. R. [1907] 2 K. B. at p. 77; cf. also p. 540 *infra*.

It should be noticed that here he has a guilty intention at the time when he receives the thing from the owner. If he had received it innocently, and had not conceived until afterwards the idea of appropriating it, his conduct would not be larceny (unless he were a bailee, see p. 189).

In some cases an actual "trick" is carried out, some false artifice¹ or misrepresentation, like those involved in the use of false weights, or in the practices of ring-dropping² and of "ringing the changes³," or in the "confidence trick." Still simpler pretences are a representation by the thief that he has been sent by customers to fetch away the goods⁴ they had bought; or a representation that he wants change for a sovereign, which affords him an opportunity of running off with both the sovereign and the change also⁵. But it is not essential that there should be any such *active* fraud. It is enough if the offender obtains the thing from the owner, fully intending to appropriate it, and knowing at the same time that the owner does not intend him to appropriate it. It is thus abundantly clear that if the owner only consents to give up the mere possession of the thing (*e.g.* to lend a horse for a ride), the fact that this consent was obtained by fraud will prevent its constituting any defence for the larceny of subsequently appropriating the thing.

But if the owner had consented to give up not only his Possession but also his Property in the thing, then—even though there may have been such fraud as to vitiate the transaction, still more if there were merely the owner's own mistake—may not a valid possession have passed in spite of the error, and a larceny consequently have been rendered impossible? This question involves various alternative possibilities, which we must consider separately.

¹ *E.g.* cardsharping; for the victim meant his money to pass only if won by fair playing; 9 Cr. App. R. 174.

² *Rex v. Patch*, 1 Leach 238.

³ *E.g.* change a florin for sixpences, and then the sixpences into pence, and carry off both the pence and the florin. *Reg. v. McKale*, L. R. 1 C. C. R. 125.

⁴ *Rex v. Hench*, R. and R. 163 (K. S. C. 264).

⁵ *Rex v. Williams*, 6 C. and P. 390 (K. S. C. 265).

(a) It is usually by active Fraud on the part of the thief, and not by a mere spontaneous blunder of the owner himself, that the latter is led to give a defective consent to a transfer of his ownership. But such a fraud may take either of two forms. If it be merely such as, in property law, gives the alienor only a right to rescind the alienation, and does not prevent a legal ownership¹ (though only a voidable one), and a consequent right of possession, from passing meanwhile to the alienee, then the alienee's crime will not be that of larceny, but only the misdemeanor of obtaining by false pretences². If, however, the fraud related to some circumstance so fundamental³ that, notwithstanding the owner's intention to alienate, no right of property (not even a voidable one) passed to the author of the fraud, the latter will have committed a larceny. Similarly, there will be a larceny if the owner's intention was not to make an immediate and absolute alienation but only a deferred or a conditional one; as where a stranger purports to buy a horse in a fair for ready money, but mounts it and rides off without paying the price⁴. Such a transaction may at first sight seem to resemble the misdemeanor of a fraudulent obtaining of ownership, rather than the felony of larcenously taking away possession from a continuing owner. But the latter view of it has prevailed; for the owner, it is said, must have intended only a conditional alienation, by which the property would not vest absolutely in the recipient until the price was paid. This argument, however, does of course involve a conjectural assumption as to the owner's state of mind with regard to a

¹ Or even merely a power to confer ownership; L. R. [1911] 1 K. B. at p. 479.

² See p. 241 *infra*. Cf. 5 Cr. App. R. 102.

³ Anson on Contract, ch. vi., Pollock on Contract, ix. 2. Cf. L. R., 2 C. C. R. at p. 45; *Rex v. Tideswell*, L. R. [1905] 2 K. B. 273. Such errors may relate to the Person (*Cundy v. Lindsay*, L. R. 3 App. Ca. 459); or the Subject matter (*Couturier v. Hastie*, 5 H. L. C. 673); or the Nature of the transaction (*e.g. Welshing, Reg. v. Buckmaster*, L. R., 20 Q. B. D. 182).

⁴ *Reg. v. Russett*, L. R. [1892] 2 Q. B. 313 (K. S. C. 349). Cf. 4 Cr. App. R. 17, 53.

contingency that possibly never occurred to his mind at all. A further reason, perhaps more satisfactory, is that inasmuch as there was no *consensus voluntatum*, no "meeting of two minds in one and the same intention"¹—the prisoner never having any genuine intention to contract—the arrangement (whatever its conditionality or unconditionality) was wholly void in law, and therefore could confer on the prisoner no rights whatever; though he himself would be "estopped" from asserting its invalidity.

(b) Occasionally, however, a man's own spontaneous Mistake leads him to wish to make over all his rights in some chattel. If that mistake amounts to a Fundamental error (see p. 208 n.), and the recipient knowingly and dishonestly avails himself of it and appropriates the thing, does he commit larceny? This question was discussed very fully in *Reg. v. Middleton*². A post-office clerk, when about to pay out money to a savings-bank depositor, consulted by mistake the wrong letter of advice; and consequently handed over to the depositor a far larger sum than really stood to his credit. The man took the money, knowing full well that it was paid to him by mistake. On being indicted for larceny, he was convicted; and the conviction was upheld by eleven judges against four. Eight³ of these eleven judges held that, even here, the clerk's mistake was one sufficient to prevent both the property and even the possession from passing⁴; and regarded the prisoner's taking of the coins as felonious. They insisted that a mere inoperative intention on the part of an owner to pass the property—inoperative in itself, and known to the thief to be inoperative—could not be enough to prevent the appropriation from constituting a larceny. On the

¹ Sir F. Pollock. Cf. *Rex v. Oliver*, 4 Taunton 275.

² L. R. 2 C. C. R. 38 (K. S. C. 266).

³ For Pigot, B., seems to have "quite acceded to" the legal doctrine of the seven others, though advancing a further view of the particular facts.

⁴ Sir Frederick Pollock thinks that this doctrine had already been conclusively established in the earlier case of *Hardman v. Booth* (1 H. and C. 803); which, however, was not cited in *Reg. v. Middleton*. See Pollock and Wright on Possession, p. 112.

other hand, seven judges thought that an owner's consent to pass not only possession but also property might, even when too defective to pass a perfect title, still suffice to prevent the taking of possession from being a larceny; in spite of there being mistake, or fraud, of such a nature as to prevent the consent from being operative. (But three of these seven, it may be added, upheld nevertheless the conviction of Middleton; on the ground that the full authority of an owner had not been delegated to the post-office clerk.)

But, now, the Larceny Act, 1916, s. 1 (2), i, by a general provision that Stealing shall include the taking of a thing "under a mistake on the part of the owner, with knowledge on the part of the taker that possession has been so obtained," seems to establish the doctrine of the eight judges.

(5) To this discussion of the effect of an owner's consent in giving a "colour of right" and so preventing a taking from being larcenous, we may add that where the taking is by consent of the owner's agent or apparent agent, as where a cook gives scraps of food to a beggar, the same principles will apply. And a wife will usually have sufficient appearance of being her husband's agent for this purpose¹. But her consent to the taking of his goods is no defence where they are taken by her adulterer². It may reasonably be conjectured that where (under the Married Women's Property Act, 1882) property belongs to a wife, the consent of her husband would similarly be held to afford a sufficient "colour of right" to excuse a taking.

§ 10. THE INTENT

The Act of 1916 requires "intent, at the time of the taking, *permanently* to deprive the owner" of his chattel. The mere fact of taking possession surreptitiously of another man's goods raises a presumption of that criminal intent. But there is no larceny when a thing is taken quite unintentionally; as

¹ *Rex v. Harrison*, Leach 47 (K. S. C. 274).

² *Reg. v. Featherstone*, Dearsly 369 (K. S. C. 274).

when a guest, playing at bagatelle, puts a ball in his pocket, and goes away forgetting it. And even an actual intention to take away the owner's possession from him, but only *temporarily*, will not suffice¹; as when a schoolboy takes out of his master's desk a "crib" wherewith to prepare a lesson. Similarly a husband who takes his wife's diary merely that he may produce it as evidence against her on his petition for a divorce, does not commit a larceny. To seize your debtor's property wrongfully, but merely for the purpose of inconveniencing him by detaining it until he pays your debt, is thus no larceny but only a tort. So again, it is no larceny for the finder of an article to refuse to deliver it up when first asked for, if he is delaying merely in hopes of a reward being offered. To take a key merely for unlocking a safe, even though it be with the object of stealing the contents, is no larceny². And thus a boy may steal a ride without stealing the donkey³. He does of course commit a trespass; but he does nothing that amounts, in the law of tort, to a "conversion." Nor will even his turning the animal loose, when he has finished his ride, necessarily constitute a conversion. But if he dismissed it at some place so remote that it would be unlikely to find its way back to its owner, he would usually be guilty of a conversion, and of a larceny. For the abandoning it with a reckless disregard as to whether or not it will be recovered by the owner, is evidence of an intention to deprive him of it altogether⁴.

It has already been seen (*supra*, p. 191) that, where goods are bailed, only an act of conversion by the bailee quite

¹ English law, like Scotch and even Roman-Dutch, thus rejects the Roman "*furtum usûs*." But Scotland (7 Justiciary 189) punishes the borrowing of a document to *steal* from it valuable secrets; and see p. 540 *infra*.

² *Reg. v. Haslam* (C. C. C. Sess. Pap. LXVII. 66). So, when in May, 1914, at the porch of the Central Criminal Court a banker's ledger was taken, by deceit, from a witness; but only for temporary detention, to prevent its being used as evidence in a pending trial. Cf. *Rex v. Jones*, 19 Cr. App. R. 39.

³ *Rex v. Crump*, 1 C. and P. 658 (K. S. C. 284).

⁴ Cf. *Rex v. Oliver* (Transvaal [1921] 120); *Rex v. Laforte* (Cape [1922] 487); as to motor-cars. Even an intention to repay the value will not excuse a *permanent* appropriation.

inconsistent with the bailment can amount to an appropriation. Equally must there, in the case of all other larcenies, be an intention to appropriate the thing in a manner wholly inconsistent with the rightful possessor's interest in it. (But in them such an intention may be sufficiently manifested by many acts which it would have been quite permissible for a bailee to do, though they shew gross dishonesty in the case of anyone who has no right to be in possession of the thing at all.) There is no sufficient appropriation if a servant takes his master's goods merely for the purpose of bringing them back and then defrauding him by a pretence of having meanwhile done work upon them and earned wages thereby¹. And similarly, it is no larceny for a man, who is only temporarily in need of money, to carry off another person's overcoat and pawn it, with a full intention of redeeming it and returning it, and with a full likelihood of being able to carry out this intention². But a man must be taken to intend the natural consequences of his conduct; and therefore if, when he pawned the overcoat, he had not an immediate prospect of being able to redeem it, the mere hope and desire on his part of restoring the coat, if he should ever become able to do so, will not suffice to negative a larcenous intent³. An intention of appropriation does not cease to be criminal because the owner is unknown, or even quite untraceable (see p. 196).

It should be observed that the mere intention thus to injure the owner suffices, even though the thief have no intention to benefit himself by the theft. It thus is not essential in English law, as it was in Roman law⁴, that the theft should be committed *lucri causâ*. Accordingly where a servant, in order to suppress inquiries as to her character, took a letter

¹ *Reg. v. Holloway*, 1 Denison 370 (K. S. C. 285).

² But it will be an offence of "Unlawful Pawning"; cf. p. 192 n. *supra*.

³ *Reg. v. Trebilcock*, D. and B. 453.

⁴ *Digest*, XLVII. 2. 1. 3. In 1904 a cook on a Rhine steamer angrily threw some pans overboard. The Cologne court acquitted her both (1) of damaging them, for they lie in the river intact, and (2) of stealing them, for she sought no *lucrum*. But Scottish, French and (recently) Roman-Dutch law, have abandoned *lucri causâ*.

and destroyed it, she was convicted of a larceny of it¹. Similarly if, at the termination of a drunken fight, one of the combatants should, in his ill-temper, pick up the hat which his antagonist has dropped, and fling it into a river, he would commit larceny. Had he, however, flung it merely into a field, there would be no evidence of any intention to deprive the owner of it permanently.

There is, however, one exceptional case in which a thief's intention merely to deprive the owner of his ownership, without any intention of also benefiting himself by his theft, will not suffice for larceny. For by 26 and 27 Vict. c. 103 (a statute passed in consequence of a case that excited a momentary agitation), it has been made no longer a larceny for servants to give to their master's animals, against his orders, food that belongs to him; and it is, instead, made a petty offence, punishable on summary conviction.

By far the most difficult question that arises in respect of the *animus furandi* is that of Time. At what moment must the guilty intention exist, in order to render an appropriation larcenous? The answer must differ, accordingly as the accused person's original possession was a lawful one or not.

If it were lawful, then no dishonest intention that arises only subsequently could amount at common law to a larceny² (but it has, as we have seen (p. 189 *supra*) been provided by the Act of 1916 that *bailees*—though their original taking of possession is of course a lawful one—may be convicted of larceny if they, however long after receiving possession, convert to their own use the article bailed).

If, however, the original taking of possession were in any way unlawful, then any subsequent determination to appropriate the thing will operate retrospectively, and will convert that taking into a larceny. Even if the original taking were no more than a trespass (*e.g.* taking the wrong umbrella by

¹ *Reg. v. Jones*, 1 Denison 182. The Larceny Act, 1916, follows this common-law doctrine.

² *Rex v. Holloway*, 5 C. and P. 525 (K. S. C. 288).

mistake, or borrowing a neighbour's plough for an afternoon's work without his leave), a subsequent intent to appropriate the thing so taken will thus relate back, and render the act a larceny. Thus where the prisoner drove off amongst his own lambs a lamb of the prosecutor's by honest mistake, but, after he had discovered the error, proceeded to sell the lamb, he was convicted of larceny¹.

Let us apply these two principles to the very common case of the finding of lost articles². If the owner has intentionally abandoned all right to them, of course the finder may appropriate them, and thereby become true owner³. But even where there has been no such abandonment, and consequently the finder does not become owner of the thing which he has found, he will not commit any crime by appropriating it, unless, at the very time of the finding, he both

(i) "believes

(α) that the owner can be discovered by taking reasonable steps" (Larceny Act, 1916, s. 1 (2) i); and

(β) that that owner had not intentionally abandoned the thing⁴,

and yet also (ii) forthwith resolves to appropriate it.

In determining whether or not a finder has had reasonable grounds to believe that the owner could be discovered, it will be important to take into account the place where the thing was found, and also its own nature, and, again, the value of any identificatory marks upon it. Thus in the case of cheques, bills of exchange, promissory notes, and other securities that carry the owner's name upon them, a finder could scarcely think it impossible to trace out the owner, even though it were in a crowded thoroughfare that he picked up the papers.

¹ *Reg. v. Riley*, Dearsly 149 (K. S. C. 289).

² See Pollock and Wright on Possession, pp. 171-187. If the finder take possession with no intention of restoring them to the owner, he commits a Trespass; if he make any use of them, he commits a Conversion; if he take them with intent to appropriate them, it may be a Larceny.

³ *Supra*, p. 193.

⁴ *Reg. v. Thurborn*, 1 Denison 387 (K. S. C. 276).

Similarly in the case of articles left in a cab, the driver will generally have a clue to the owner from knowing where he picked up, or set down, his passengers¹. And where property has been accidentally² left by a passenger in a railway train, it has always been held to be larceny for a servant of the railway company to appropriate it instead of taking it to the lost-property office³.

Every finder, it has always been clearly held, has a "special property," *i.e.* a right to possession; so that he could maintain against any stranger the old actions of trover, detinue, or trespass⁴. But it must be noted that he has not—as some bailees have—a right of possession against the owner himself. The owner remains all the while in "constructive possession" of the article; and hence, if any third person should dishonestly take it from the finder, that person may be treated as having stolen it from the owner⁵.

Cases of finding present, however, much less difficulty than those of mutual error, *i.e.* where a wrong article has been both given, and accepted, in mistake for something else which both parties believed they were dealing with. Simple as is our twofold rule as to the time of the *animus furandi*, it is not easy to apply it in these cases; because of the difficulty of deciding which was the moment when, in contemplation of law, the technical possession shifted, and the thing accordingly was "taken⁶." When walking together in the evening, *A* asks *B* to lend him a shilling; and *B* gives him a coin which both of them, owing to the darkness, suppose to be a shilling⁷. But, after they have separated, *A* discovers the

¹ And, if no clue, he ought to deliver the articles to the cab-owner; as he is "Possessor" of the cab and its contents. Cf. p. 186 *supra*.

² Contrast the newspapers *intentionally* abandoned there by him.

³ Cf. *Reg. v. Pierce*, 6 Cox 117; contrast a mere coin found on an open moor, 18 Bombay 212.

⁴ Pollock and Wright on Possession, p. 187.

⁵ *Reg. v. Swinson*, C. C. C. Sess. Pap. cxxxii. 132.

⁶ See 6 Edw. VII. c. 32, s. 4, as to the special duty of finders of stray dogs.

⁷ Or a sovereign is put into an organ-grinder's cap, by mistake for a penny. In Dublin, in one single year (1902), sixteen gold coins, that had been given to cabmen in mistake for silver ones, were handed by them to the police.

coin to be a sovereign; and thereupon resolves nevertheless to spend it. When, in point of law, did *A* "take" this sovereign into his possession? If it were when the coin was actually handed to him, then (as he had at that time no guilty intent) he "took" it innocently; and therefore no subsequent appropriation of it can make him guilty of larceny. But, on the other hand, if the law does not regard him as having taken possession of it until he came really to know what it was, then (as he simultaneously formed the intention of appropriating it) he will be guilty of larceny. The whole question therefore resolves itself into this, What mental element is necessary for legal possession? "Delivery and receipt," said Lord Coleridge, C.J., "are acts into which mental intention enters. There is not in law, any more than in common sense, a delivery and receipt, unless the giver and receiver intend respectively to give and to receive what *is* given and received." Yet there still remains difficulty in determining what precise extent of concurrence between their intention and the facts is necessary. Thus in *Ashwell's Case* (where the circumstances which we have above described arose) although all the fourteen judges were agreed¹ in adhering to the rule that "if the original taking is innocent, no subsequent appropriation can be a crime," yet seven of them were for upholding his conviction for larceny, whilst seven² were for quashing it³. In the similar and later case of *Reg. v. Hehir*⁴ the Irish Court for Crown Cases Reserved was divided almost equally closely; four judges being in favour of the conviction, but the remaining five in favour of quashing it. It must be noted that in both these difficult cases the mutual error went so far as to be a mistake about the species of the article, and not merely about its marketable value. Had the error

¹ As was stated in *Reg. v. Flowers*, L. R. 16 Q. B. D. 643.

² Whose view Lord Loreburn approved, in the Committee on the Larceny Bill, p. 21.

³ L. R. 16 Q. B. D. 190 (K. S. C. 292). The rule of the Court being "præsumitur pro negante," the conviction stood affirmed. See p. 541 *infra*.

⁴ Irish L. R. [1895] 2 Q. B. 709 (K. S. C. 300).

concerned value alone, it certainly would not have prevented the possession from passing at the moment of the physical delivery. As was said by Madden, J.¹: "*A* may deliver to *B*, in discharge of a trifling obligation, an old battered copy of Shakespeare printed in 1623; both innocently believing at the time that—being old, full of errors and misprints, and badly spelled—it would only fetch a couple of shillings at an auction. Suppose *B* then to sell it to a collector for several hundreds of pounds², and to appropriate the proceeds, he would not be guilty of larceny; inasmuch as there was an intelligent delivery of the chattel itself, though there was a mistake as to its value." But in the view of those judges who upheld the convictions of Ashwell and Hehir a mistake as to the species of a *coin* is not a question of mere value but one of identity. Now in contracts for the sale of chattels, any mistake of identity undoubtedly avoids the contract; since there is no *consensus ad idem*, and therefore³ the property does not pass. Yet even then it does not follow that legal possession may not pass. True, there are two civil cases⁴ in which it was held that the delivery of a bureau (whether on sale or on bailment) is *not* a delivery of its unknown contents (*e.g.* money lying in some secret drawer); and accordingly that these are not "received" by the deliverer until he knows of their existence. These cases go so far as to shew that a person does not always "receive" a thing by its merely coming into his physical possession. But, inasmuch as the parties dealing with the bureaux were ignorant of the very existence of the money, these cases fall short of *Ashwell's Case*, where both parties quite knew that it was with a coin that they were dealing⁵.

¹ *Reg. v. Hehir* (K. S. C. at p. 301).

² A well-known Cambridgeshire antiquary sold in 1906 for £2500 a book which he had bought in a cottage for 2s. 6d.

³ *Raffles v. Wichelhaus*, 2 Hurlstone and Coltman 906.

⁴ *Cartwright v. Green*, 8 Vesey 405; *Merry v. Green*, 7 M. and W. 623.

⁵ In *Reg. v. Ashwell* those who maintained that knowledge of the true nature of the thing was essential also held that the taker had at first merely an excusable "detention"; and accordingly, if he had paid away the coin

We therefore can only say that, if a chattel is given and received "intelligently," the possession will certainly pass; and beyond this we must not go. For it is not yet possible to lay down authoritatively *what* exactly it is that must be understood with due intelligence by the parties.

Where the mutual mistake relates to the person for whom a letter is intended, it has more than once been held¹ that if a postman mis-delivers a letter, and then the recipient, on opening it and finding it not to be meant for him, nevertheless appropriates some article which was enclosed in it, he commits no larceny. For there was no *animus furandi* at the time when the letter came into his hands; and the delivery of a letter, unlike that of a bureau, clearly is always intended to include delivery of all its contents. Thus a letter addressed to a Mrs Fisher in one house was delivered to a Mr Fish living in another; and, on opening it, he found that it contained a cheque. This he proceeded to endorse (in the name of Fisher) and to cash. On an indictment for stealing this cheque, he was acquitted; the court holding that the legal "receipt" both of the letter and of the cheque took place at the actual moment when the envelope reached Fish, although he then mistakenly supposed it to be a letter for himself².

§ 11. THE PUNISHMENT

As regarded its punishment, larceny presented some anomaly at common law; for, though a felony, it was not before discovering its nature, he would have been protected from any claim by the owner for its proper value. But an intermediate view has since been suggested by Mr Justice Wright (*Possession*, p. 210; cf. p. 105), viz. that the mistake did not thus invalidate the acceptance, but that it did invalidate the delivery; so that, though a new (and an excusable) possession did arise, it was a trespassory one, and accordingly the subsequent *animus furandi* related back and made the taker guilty of larceny; cf. pp. 213-4.

¹ *Rex v. Mucklow*, Moody 160; *Reg. v. Davies*, Dearsly 640; see Pollock and Wright on Possession, p. 113, as to the authority of these cases being still maintainable, whatever view be taken of the subsequent conflict of opinion in *Reg. v. Ashwell*.

² C. C. C. Sess. Pap. CXXXI. 212. Fish might, however, have been indicted under 7 Wm. IV. c. 36, s. 31, for the statutory misdemeanor of "fraudulently retaining a post-letter which ought to have been delivered to some other person."

invariably a capital offence¹. A distinction was made, according to the pecuniary value of the thing stolen. If it were worth only twelve pence² or less, the offence was merely a "Petty" larceny; and, although a felony, was not punishable with death. If the thing were worth more than 12*d.* the crime was a "Grand" larceny³; and at least as early as the time of Edward I.—probably indeed by the legislation of the stern "Lion of Justice," Henry I.⁴—it became punishable capitally. The phrases "Petty" and "Grand" have become obsolete since the abolition in 1827 of the distinction between them⁵. But larceny still admitted a division into two forms; the Simple and the Aggravated.

Simple larceny—as now defined by the Larceny Act, 1916—is, as we saw (*supra*, p. 184), declared therein to be punishable either with penal servitude for not more than five years or less than three, or with not more than two years' imprisonment with or without hard labour⁶. If convicted on an indictment, the offender cannot be fined; but upon summary conviction by justices of the peace, he may be. A person convicted of simple larceny, after having been previously convicted of any felony whatever, may be sentenced to ten years' penal servitude⁷.

Aggravated larceny is of various kinds; punishable by various long periods of penal servitude, ranging from the offender's life down to seven years. The circumstances by which larceny may be aggravated are of four species.

(1) The place where it is committed; *e.g.* a ship⁸, dock⁸, wharf⁸, or wreck⁸, or (if the stolen property be worth not

¹ *Supra*, p. 93.

² See the Laws of Athelstane (v. 1). Under Edward I. the 12*d.* was reckoned to be eight days' wages of a man.

³ Cf. Bolland's *General Eyre*, p. 66.

⁴ Pollock and Maitland, II. 496. "If two or three jointly steal goods to the value of twelvepence halfpenny, they shall *severally* have judgment of life and limb"; *Eyre of Kent*, A.D. 1313, p. 90.

⁵ 7 and 8 Geo. IV. c. 28, s. 2.

⁶ Larceny Act, 1916, ss. 2, 37 (4). And a boy under sixteen may be whipped.

⁷ *Ibid.* s. 37 (1).

⁸ *Ibid.* s. 15.

less than £5) a dwelling-house¹. The maximum punishment in each of these five cases is fourteen years' penal servitude.

(2) The manner in which it is committed; *e.g.* by stealing from the person². If the property is not only stolen from the person of someone but taken from him by force (snapping a watch-chain suffices); or if he is led to give it up by being put in fear of force being used; the offence obtains the name of Robbery³. The force need not be great⁴. Yet obtaining money from a solitary woman in a lonely place by a threat, not to use force, but merely to accuse her of being there for evil purposes, would not be robbery; though it would, as we shall shortly see, constitute a statutory felony. And even actual force, if it does not begin until after the taking, will not make a larceny become a robbery.

The maximum punishment of these offences is again fourteen years' penal servitude. But for robberies that are further aggravated in certain specified ways (as by the robber's being armed, or having a companion, or using any personal violence), the maximum punishment rises to penal servitude for life⁵; and a flogging may be added, unless the offender be a woman. Even if no article be actually taken, and so no robbery be effected, the mere assault with intent to rob is a felony, and punishable with five years' penal servitude⁶. Similarly to demand a thing by force or with menaces, with the intent to steal it—though there be no assault and the menaces do not relate to physical violence—is a felony incurring the same punishment⁷.

¹ Larceny Act, 1916, s. 13.

² *Ibid.* s. 14. *E.g.* pocket-picking.

³ *Ibid.* s. 23 (2). Six times rarer now (proportionally) than fifty years ago. Is this a decadence? For Fortescue (L.C.J., 1442–1460) preferred the many English robbers to the many French thieves, since "there is more spirit and a better heart in a robber than in a thief" (*Monarchy*, c. 12).

⁴ Catching hold of an arm suffices. The gentle application of a chloroformed rag, producing a mere momentary unconsciousness, was held sufficient by the Court of Criminal Appeal; since "it was all the violence that was necessary for the purpose": *Rex v. Carney*, Dec. 18, 1922.

⁵ *Ibid.* s. 23.

⁶ *Ibid.* s. 23 (3).

⁷ *Ibid.* s. 30. It is enough if the menace "unsettle the mind"; hence a groundless threat of a divorce petition was held by Lord Darling in 1924 to

(3) The person by whom it is committed. For a larceny by a clerk or servant, the maximum punishment is raised to fourteen years' penal servitude¹, owing to the opportunities of dishonesty which are necessarily placed within the reach of all persons thus employed, and to the breach of trust which is involved in taking advantage of them. The discussion of the difficult question "Who is a clerk or servant?" may be deferred until the subject of Embezzlement is dealt with².

(4) The subject-matter which is stolen. Thus the larceny of cattle, or of ten shillings' worth of textile goods exposed in process of manufacture³, is punishable with penal servitude for fourteen years. (But maliciously destroying such textile goods is punishable with penal servitude for life⁴.) Again, for stealing letters from a post-office, or from a postman, the maximum punishment is penal servitude for life⁵. And yet, curiously enough, a more complex and apparently more heinous offence, viz. the stealing of a post-letter by a person who is himself an employé of the post office, is punishable only with seven years' penal servitude⁶ (unless the letter contain some chattel or money or valuable security, in which case the maximum punishment is penal servitude for life).

§ 12. QUASI-LARCENIES

In the course of the foregoing account of larceny we have had occasion to mention various articles which, though movable, were not within the old law of larceny. It is important to add that by modern statutes, it has been made a crime to steal almost any of these⁷. But such thefts are not always made "larcenies"; and some are not even made felonies, but only indictable misdemeanors or offences punishable on

suffice. But in a genuine dispute about the ownership of a chattel even physical violence would not suffice, for there would be no "stealing."

¹ *Ibid.* s. 17 (1).

² *Infra*, p. 229.

³ *Ibid.* ss. 3, 9.

⁴ 24 and 25 Vict. c. 97, s. 14.

⁵ Larceny Act, 1916, s. 12.

⁶ *Ibid.* s. 18. This lessening of punishment was perhaps due to the influence of the ancient rule that mere embezzlement was no crime.

⁷ See Stephen, *Dig. Cr. Law*, Arts. 347-354.

summary conviction. The Larceny Act, 1916, contains several instances of these statute-made thefts. But its omission (see p. 184 *supra*) to define Larceny prevents our ascertaining which of them are larcenies¹. But such thefts are construed by all the other common law rules about larceny, *e.g.* rules as to what will constitute a taking or a carrying away, or an intent to steal. It may consequently be convenient if, for want of any recognised name, we call them for the moment "Quasi-Larcenies," or, in Lord Loreburn's phrase, "Auxiliary Larcenies."

The cases of hares, and of fish, have already been mentioned. We may add some still more common instances.

(1) The theft of any valuable security² is larceny, and punishable in the same manner as if the thief had stolen a chattel of like value.

(2) To steal trees of the value of £1³ or more, if growing in a park or garden, or to steal fixtures⁴ or the title-deeds of land⁵, is a felony punishable (like simple larceny) with five years' penal servitude.

(3) To steal wild deer in *inclosed* land (24 and 25 Vict. c. 96, s. 13), and to steal mineral ore from the mine⁶, are felonies, but punishable with no higher penalty than two years' imprisonment, with or without hard labour.

(4) And it is a petty offence punishable, on summary conviction, with (for a *first* commission of the crime) six months' imprisonment with or without hard labour, to steal any plant, fruit or other vegetable production growing in a garden or orchard⁷, or any *cultivated* root or plant—*fruit* is not included—growing elsewhere⁸, or to steal a dog⁹, or indeed to steal any bird, beast or other animal which has been ordinarily¹⁰

¹ See 7 C. and P. 667 *n.*; cf. 8 C. and P. 294. The marginal note to s. 5 of the Larceny Act, 1916, creates further confusion as to this word.

² Larceny Act, 1916, s. 46 (1).

³ *Ibid.* s. 8 (2).

⁴ *Ibid.* s. 8 (1).

⁵ *Ibid.* s. 7.

⁶ *Ibid.* s. 11.

⁷ 24 and 25 Vict. c. 96, s. 36.

⁸ s. 37.

⁹ *Ibid.* s. 18.

¹⁰ It suffices that the individual has been so kept; though those of its species are not confined ordinarily.

kept in confinement (*e.g.* a canary) or for any domestic purpose (*e.g.* a cat) and is not larcenable at common law¹.

§ 13. RESTITUTION OF POSSESSION

The only remaining topic to be considered in connexion with larceny, is that of the Restitution of the stolen property. The thief, as we have said, aims at depriving the true owner of all the benefits of his ownership. But of the ownership itself he cannot deprive him. It is important for the student to avoid the misapprehensions on this point which are apt to arise from the ambiguity of the word "property." That term may mean² either the physical object which is owned (*e.g.* "This umbrella is part of my *property*"), or the legal right which the owner has over it (*e.g.* "The finder of a lost umbrella acquires a special *property* in it"). It is only in the former sense that we can ever speak of "lost property" or of "stolen property." For property in the second sense (*i.e.* the intangible right of ownership) cannot be stolen or mislaid. A theft, then, leaves unaltered the ownership in the goods stolen³: so that the owner is still entitled to seize upon the thing, or to bring a civil action to recover it from the thief. There is an apparent exception to this where the thief has gone on to destroy the thing, or even to alter its essence irrecoverably by making out of it an entirely new kind of thing. In the latter case, as when *A* takes *B*'s barley and makes it into malt, or *B*'s planks and builds a summer-house with them, he acquires title, by *Specificatio*⁴, in the new thing thus created. For, just as if *A* had burned the planks, or had fed pigs with the barley, *B*'s ownership is utterly gone⁵; and, consequently, his civil remedy is an action for damages alone. Yet even here there is no real exception to the principle we

¹ 24 and 25 Vict. c. 69, s. 21. Cf. p. 202 *supra*.

² Austin's *Jurisprudence*, Lect. XLVII.

³ It is usually said that even the *possession* remains, constructively, in the owner (1 Hale P. C. 507); but see Pollock and Wright, p. 157, as to whether this should not be understood only as the *right* to possession.

⁴ See Justinian, *Inst.* II. 1. 25-29.

⁵ Y. B. 5 Hen. VII. fo. 15, pl. 6.

laid down. For it was not by the theft, but by further conduct, posterior to the theft, that *B*'s ownership was extinguished¹.

Since a thief does not become owner, he cannot confer ownership upon anyone else; for *non dat qui non habet*. Hence the original owner may sue the thief, or anyone to whom the thief has given or sold the stolen article, in a civil action to recover it or its value. Moreover, to save owners the trouble and expense of this fresh litigation, it has been enacted that an order for restitution² of stolen property may be made by the criminal court (even though it be a court of³ mere summary jurisdiction) before which any person is convicted⁴ under the Larceny Act, 1916, of larceny or embezzlement or conversion or theft in any form, or even false pretences. But it should only cover such stolen property as

¹ If *A* had dealt with the materials in a less trenchant manner, so that the law would regard their identity as still continuing and as being still traceable—as where leather is made into shoes, cloth into a dress, or a log into planks (*Betts v. Lee*, 5 Johnson, New Yk. 348)—ownership would not have been changed; and *B* might lawfully have seized the whole of the manufactured product.

Indeed, *A*'s misconduct will sometimes have even the result of actually enriching *B*. For if, by a *Confusio*, *A* mingles *B*'s goods with his own, and not in a mere separable combination (like a heap of chairs) but so as to become mixed undistinguishably (as in a heap of corn), then the law confers upon *B* the ownership of the whole mass. *B* therefore becomes entitled to carry off even that part which, before the theft, did not belong to him at all (Popham 38, mixing hay). Similarly, in *Accessio*, if *A* take *B*'s dressing-gown and embroider it with his own thread, *B*, as owner of the "principal," can retake the garment and, along with it, the "accessory" embroidery (1 Hale P. C. 513). Nor does the English law require him in any of these cases to pay compensation for the advantage he obtains. Roman law did. See Prof. Buckland's *Textbook*, pp. 210–211.

It should be added, however, that in those cases of *Confusio* where the commingled articles are identical not only in kind but even in mere quality and value, it is doubtful whether the general rule would not be modified, by making *A* and *B* joint owners of the total mass (see 15 Vesey 442).

² Larceny Act, 1916, s. 45 (1), (2). See p. 227 *infra*.

³ 42 and 43 Vict. c. 49, s. 27.

⁴ But *before* conviction no such order can be made. Hence until then the police must exercise discretion about handing to the owner any goods they have rescued from a thief; e.g. about posting to the addressees the letters he has stolen from a pillar-box. Cf. pp. 227–8 *infra* as to judicial orders.

has been mentioned in the indictment and has been produced and identified at the trial¹.

But it must now be added that upon this general principle, *Non dat qui non habet*, the common law soon engrafted two exceptions, which the necessities of trade had shewn to be indispensable for the security of purchasers². One depends upon a peculiarity in the stolen property itself; the other upon a peculiarity in the place where the purchaser buys it. A man who, in all ignorance of the theft, gives the thief valuable consideration in exchange for the stolen property, may, in spite of its having been stolen, acquire a good title to it, if either (i) this stolen property consisted of money or of a negotiable security, or if (ii) it was transferred to him in a "market overt."

(i) To secure the free circulation of current coin³, the law treats as indefeasible the title to money which is paid away (a) for value and (b) to an innocent recipient (L. R. 14 Q. B. D. 34); and this, even though the particular coins may chance to be still identifiable. Yet even money can be claimed back by its original owner from a beggar to whom the thief has generously flung it; or from a companion to whom he has paid it in discharge of a bet; or, again, from shopkeepers who have sold goods to him for it, but in full knowledge that he had no lawful right to the coins he was paying them⁴. And it has recently been held that if the coins were dealt with, not as currency but, as chattels, the privilege does not apply. Thus, where a stolen Jubilee £5 piece had been acquired, by an innocent purchaser for value, as a curiosity,

¹ It ought to be made only in very clear cases; for the dispossessed third party has no power of appeal (except in a case where the conviction itself is appealed against).

² Williams' *Personal Property*, Part iv. p. 588.

³ "Nec secta...de denariis foret acceptanda, propter eorum consimilitudinem qui sunt ejusdem fabricæ per totum regnum"; *Eyre of Kent*, i. 78, A.D. 1313. Hence experienced thieves prefer to steal money or bills rather than chattels; for coin is hard to identify, and bills fetch a better price than chattels because the receiver gets a safer title.

⁴ Williams' *Personal Property*, 17th ed. 589.

the original owner was held to be entitled to recover it or its worth¹. The distinction is perhaps to be regretted; as making a *bonâ fide* receiver's title depend upon a question so uncertain, even possibly to himself, as that of his intentions about his future treatment of the coin.

When modern commercial law introduced a paper currency, in the shape of bills of exchange and promissory notes, the privileges of money were (under similar restrictions) conferred on them. This privilege it is which renders them not merely "assignable" but "negotiable²." Hence the honest finder of a lost bill, though he obtains no title to it, can give a title.

(ii) Fairs and markets, moreover, brought together men from places so distant that, in mediæval days, the purchaser had little means of knowledge about the vendor he dealt with there, and consequently he needed the protection of some legal privilege³. Hence it became settled that even the most ordinary chattels might be effectually alienated by a mere thief, if he sold them for value to a *bonâ fide* purchaser on a market day, in such a place as was a lawfully established market for the particular kind of goods concerned—*e.g.* cattle, or corn, or cloth. And the publicity and rarity of the privileged occasions made this exceptional rule work comparatively little injury in the way of encouraging thieves. But modern facilities of intercourse have lessened the need for this protection; and, accordingly, modern legislation has restricted its completeness. For now, even when the ownership of goods has been divested by a sale in market overt, it will be re-vested in the old proprietor if the thief, or the guilty receiver,

¹ *Moss v. Hancock*, L. R. [1899] 2 Q. B. 110.

² Anson on Contracts, ch. ix. s. 1. But the rule of Evidence is that theft taints a negotiable instrument; so a subsequent holder loses the benefit of the normal presumption and has the burden of *proving* that he took it in good faith and for value. It has however been held in Australia that, in a similar action to recover stolen money from a thief's payee, the owner has to prove that the payee's title is defective (*Freedman v. Black*, 12 Commonwealth 105).

³ Cf. Pollock and Maitland, II. 154, 164.

be convicted of the stealing or receiving¹; a rule intended to stimulate owners to activity in prosecuting. (The court which convicts may itself issue an order for restitution (p. 224 *supra*), and so save the trouble of a civil action². Such an order does not create any new right; the mere conviction has upset the effect of the sale in market overt³.) But a conviction does not revest the ownership retrospectively. Accordingly, though the present holder must give up the article to the old owner, yet if the former were not the original purchaser in market overt, the owner will have no right of action in "trover" against that original purchaser, or against any intermediate holders.

Hence after a conviction for larceny (but usually not after one for false pretences⁴) the owner is sure to be able to sue for restitution, except in the case of money or a negotiable security. And even in this excepted case, if the thief has spent the proceeds of the theft in buying some article, the owner of the money may seize that article, and the thief cannot recover it from him⁵. For an owner may "follow his money" even into the subsequently purchased goods which represent it⁶; for in the Larceny Act⁷ the word "property" includes not only the property originally possessed, but also any property into or for which it has been converted or exchanged. An innocent purchaser⁸, against whom a restitution order is made, may ask the court to compensate him by returning him, out of any moneys that have been taken from

¹ Larceny Act, 1916, s. 45 (1). This rule as to Larcenies does not extend to misdemeanors of False Pretences or of Fraudulent Conversion.

² But if notice be given of an appeal against the conviction, both the revesting and the restitution order are thereby suspended; 7 Edw. 7, c. 23, s. 6.

³ *Scattergood v. Sylvester*, 15 Q. B. 506. *Infra*, p. 253.

⁴ See p. 253 *infra*.

⁵ *Catley v. Loundes*, 2 T. L. R. 136. Cf. L. R. 17 Q. B. D. at p. 601.

⁶ But after a conviction for the theft of a blank *cheque-form*, an order cannot be made for the restitution of the money which the thief obtained by forging thereon a *cheque* and cashing it; for there is no direct "representation."

⁷ Of 1916; s. 46 (1).

⁸ *Ibid.* s. 45 (3).

the prisoner on his apprehension, the amount of the price which he had paid¹.

It will be seen that the rules which we have explained do not include any provisions for cases (1) where a thief, though really guilty, has been acquitted, or (2) where further property is claimed as stolen but has not been included in the indictment, or (3) where stolen property has been recovered by the police, but the thief has not been arrested. Accordingly the Police Property Act, 1897 (60 and 61 Vict. c. 30), has given more extensive powers; by enabling Courts of Summary Jurisdiction to order the delivery of any property, which has come into the possession of the police "in connexion with any criminal charge," to anyone who appears to be the owner. After six months from the date of such an order, this person will become indefeasible owner.

¹ In the case of a Pawnbroker with whom the stolen goods have been pledged for not more than £10, the convicting court has still greater power of compensation; for it may make the restitution-order *conditional* upon the owner's repaying the loan, or part of it, to the pawnbroker. (If the owner sued the pawnbroker in a civil court, no such condition could be imposed *there*.) The court will consider whether there has been carelessness on the part either of pawnbroker or of owner. But there is no such general power where the loan, on the individual pledge, exceeds ten pounds.

CHAPTER XIV

EMBEZZLEMENT

As early as 1529 (21 Hen. VIII. c. 7) the criminal liability of servants¹ was extended to cases in which their master had delivered (not into their mere custody but) into their full "legal" possession any valuable goods to be kept by them as bailees for him. The "imbezilment" of such goods by them was made a felony. But where goods were received by a servant into his legal possession on his master's account, not from that master himself but from some third person, who wished to transfer the possession of them (whether with or without the ownership) to the master, the statute did not apply. In such a case the deliveror has ceased to have any possession of the goods; while, on the other hand, they have not yet reached the possession of the master; and they thus are for the time being in the servant's own possession. There they will continue until he either actually delivers them to his master, or constructively does so by consenting to hold them as a mere "custodian." Until then, he accordingly cannot commit larceny of them. (Yet, somewhat inconsistently, it is held by our civil courts that this delivery to a servant, by a stranger, gives the master such a possession, as against *third parties*, as entitles him to sue anyone for damages who commits a trespass to the goods, even whilst they are still in the servant's hands².) Accordingly if a bank cashier, on receiving money at the counter, does not put it into the till, but pockets it and uses it for his own purposes, he commits no larceny. It had not reached the possession of the bankers; he therefore cannot legally be said to have "taken" it from them. Such a doctrine exposed employers to risks so great that immediately upon its definite establishment in 1799

¹ *Supra*, pp. 186, 188. See Stephen, *Dig. Cr. Law*, Arts. 335-338.

² Pollock and Wright on Possession, 130; 1 Hale P. C. 668.

by the case of *Rex v. Bazeley*¹ Parliament took action. A statute² was passed, which made it felony for any servant or clerk to embezzle money or goods thus received into his possession for his employer, although they had not reached the employer's own actual possession. (The words *embezzle* (or *imbezil*) and *bezzle* had been in use since at least the fourteenth century, as meaning "to make away with"; usually connoting some degree of clandestinity³.) The enactment now in force as to this crime⁴ provides that:

"Every person who, being a clerk or servant, or person employed in the capacity of a clerk or servant, fraudulently embezzles the whole or any part of any chattel, money, or valuable security, delivered to, or received or taken into possession by, him for, or in the name, or on the account, of his master or employer...shall be guilty of felony⁵."

As he occupies a fiduciary position, he is liable to a higher punishment than that of simple larceny. He may be sentenced to penal servitude for any term not exceeding fourteen years and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and—if a male under the age of sixteen years—with or without being once privately whipped (Larceny Act, 1916, ss. 17, 37).

The crime of Embezzlement presents three points for our consideration: (1) the persons who can commit the offence; (2) the property on which it can be committed; and (3) the mode of commission.

¹ Leach 973 (K. S. C. 305).

² 39 Geo. III. c. 85. Stephen, *Hist. Cr. Law*, III. 152.

³ The derivation is uncertain. Prof. Skeat suggests a connexion with *imbecile*, and the idea of diminishing by a purloining; but Dr Murray traces it to the French *besillier*, to ravage. The legal use of the term is almost exclusively limited, at the present day, to the statutory felony explained on this page. For its use in A.D. 1353, see K. S. C. p. 219.

⁴ Larceny Act, 1916, s. 17.

⁵ The same section makes it similarly a felony for any one employed in the public service or in the police to embezzle, or fraudulently apply, any chattel, money or valuable security that has been entrusted to, or received or taken into possession by, him in his employment.

(1) As to the first of these, the question, Who is a clerk or a servant?—the latter term here including the former—often presents great difficulty in practice. If *A* is employed by *B* to do work for him, he is not necessarily *B*'s servant, but may be merely an agent, an "independent contractor¹." He will not be a "servant" unless the agreement, between himself and *B*, puts him so completely under *B*'s control that he must obey all lawful orders that *B* may give him in connexion with the employment²; *i.e.* *B* can tell him not only what to do, but even how to do it³. To ascertain whether or not the contract between the parties did create so complete a control, we must first inquire if its terms were embodied in a written document. If they were, it will be for the court to determine whether or not they established this full control. But if the contract was an oral one, then it is by the jury that the question must be determined. In determining it, they may have to take into consideration a variety of points, no one of which is of itself absolutely conclusive. Something will depend on (*a*) the nature of the employment; thus a commercial traveller usually is a servant, whilst an insurance collector or a debt collector usually is not⁴. Again, it is important to notice (*b*) the amount of time which it was agreed should be devoted to the employment. That *A* was to give the whole of his time to *B* is strong evidence of his being a servant, though it is not conclusive. Yet, on the other hand, it is not essential; for a true servant may also work for himself, or even for other masters. He may even have been employed by the prosecutor for merely one solitary transaction; and, indeed, in principle, the relationship of master and servant is merely one of present fact, and may exist

¹ Cf. Pollock on Torts, ch. III. s. 3.

² *Reg. v. Negus*, L. R. 2 C. C. R. 34 (K. S. C. 306).

³ "You can bid your *cook* not to fry the potatoes but to mash them; but your *dentist* you can't prevent from doing many disagreeable things which he is sure to do" (Sir John Simon).

⁴ As to taxicab-drivers, see *Smith v. G. M. C. C. Ltd.*, L. R. [1911] A. C. 188. In London they are not servants but pay the cab-owner a percentage of the takings; dishonestly to pay less is a Fraudulent Conversion, p. 236.

where there is no contract binding the servant to go on serving any longer than he likes¹. Another matter for consideration is (c) the mode of payment. A periodical salary or wage is some evidence of the recipient's being a servant²; hence it is common for societies to pay their treasurers a nominal yearly sum, such as a shilling, to secure the protection of the law of embezzlement. Conversely, payment by commission, or by share of profits, tends to disprove the existence of any such relation as that of master and servant. But neither fact is at all conclusive.

(2) Passing to the property concerned, we must notice that the Larceny Act limits the offence to the appropriation of such articles as have been received by the prisoner "for, or in the name, or on the account of, his master or employer." Thus a servant can commit an embezzlement only of things that he has received *as* servant. A shopman who sells such goods as he is authorised to sell—or a workman who executes for his master's customer, and with his master's tools, work which he is authorised to execute and receive payment for—will be guilty of embezzlement if he appropriates the money paid by the customer³. But a servant cannot embezzle anything which he obtained by doing an act that was outside his authority. Hence if a gentleman's coachman takes it on himself to ply for hire with his master's carriage, and spends in drink the coins so earned, he does not commit embezzlement of them⁴. Or if a woman, employed in a shop only to act as cashier, should take it upon herself to sell ribbons at the counter, and should appropriate the prices paid to her for them, she will not be guilty of any embezzlement of the money (though she will have committed a larceny of the ribbons themselves⁵). Similarly, if a servant forges a cheque in the name of his master, and cashes it, he does not receive

¹ *Reg. v. Foulkes*, L. R. 2 C. C. R. 150 (K. S. C. 309).

² *Reg. v. Negus*, loc. cit.

³ *Rex v. Hoggins*, R. and R. 145 (K. S. C. 314).

⁴ *Per Blackburn, J.*, in *Reg. v. Cullum*, L. R. 2 C. C. R. 28 (K. S. C. 311).

⁵ *Reg. v. Wilson*, 9 C. and P. 27 (K. S. C. 313).

the coins in his capacity of servant, and therefore does not commit embezzlement by making off with them¹. But it would be embezzlement to appropriate money which he had obtained by cashing any cheque that had been sent to him on his master's account; even though it had been made out to the prisoner himself as payee².

A servant, as we have already said, can only "embezzle" what he has received *for* his master. It is not an embezzlement, but a larceny, for him to appropriate money which he has received *from* his master; and this even though it did not come to him from the master directly, but only through the hands of some fellow-servant³. Yet if, through the same fellow-servant, he had received money remitted for their master by some stranger, he can commit embezzlement of this money; for it has not yet reached his master's possession, but is stopped by him whilst still on its way to the master⁴. But if once he had put this money into his master's till⁵, his subsequently taking it out again and appropriating it would be a larceny and not an embezzlement. So would the conduct of a person who should remove a load of straw after once he had delivered it on his master's premises⁶ or even had merely put it into a cart, or a barge, that belonged to (or was possessed by) his master.

These illustrations shew vividly how fine a line often has to be drawn in determining whether it is a larceny or an embezzlement that a servant has been guilty of. The doctrine of possession is so subtle and technical that it frequently is hard to say for which of the two offences a man should be indicted; and failures of justice used often to arise in consequence. But they are now rare; as the absolute necessity of accuracy on this point is removed, so far as the indictment

¹ *Reg. v. Aitken*, C. C. C. Sess. Pap. xcvi. 336 (K. S. C. 315).

² *Reg. v. Gale*, L. R. 2 Q. B. D. 141 (K. S. C. 316).

³ *Reg. v. Murray*, 1 Moody 276 (K. S. C. 318).

⁴ *Reg. v. Masters*, 1 Denison 332 (K. S. C. 319).

⁵ *Cf. Reg. v. Sullens*, 1 Moody 129 (K. S. C. 320).

⁶ *Reg. v. Hayward*, 1 C. and K. 518 (K. S. C. 321).

is concerned. The Larceny Act, 1916, provides, by s. 44 (2), that if, on a charge of stealing, the actual crime committed prove to have been an embezzlement (or *vice versâ*), the jury may convict of the crime actually proved, instead of the crime originally charged. But this still leaves the difficult duty of saying which one *was* proved.

(3) Turning to the mode of committing the offence, we must note that, as embezzlement is committed without any change of possession, the fact of a "fraudulent" appropriation is often hard to prove. It may be shewn by absconding with the money¹, or by denials of having ever received it, or by any really wilful omission to pay it over. But the mere fact of omission, as it may have been due to pure carelessness, does not suffice to shew an appropriation². Still less does the mere fact of there being a deficiency in the servant's accounts; *i.e.* his not having actually credited to himself, in his books, disbursements sufficient to exhaust all the cash he has received. For he may merely have lost it by negligence; and negligence, however gross, is not a criminal dishonesty³. And even if he has spent it, there is nothing to shew that he did not spend it on his master's account. Moreover, when it is proved that there must have been some really dishonest appropriation, this proof will not be enough so long as the theft is only shewn to have produced a "general deficiency." There must further be evidence that the particular amount specified in the indictment was appropriated, and at the particular date and place also there specified. For otherwise the prisoner would have no means of securing himself the protection of the plea of *autrefois convict* or *autrefois acquit*⁴, in case of his being prosecuted a second time for this same charge.

¹ *Rex v. Williams*, 7 C. and P. 338 (K. S. C. 322).

² *Rex v. Jones*, 7 C. and P. 833 (K. S. C. 322). So, besides proving non-payment, you should also prove non-entry in his accounts.

³ *Lanier v. Rex*, 24 Cox 53.

⁴ *Infra*, ch. xxxi.

It is easy to understand that dishonest clerks often escape on indictments for embezzlement, because of the difficulty of thus proving an actual appropriation; even where it is clear that money has been received by them, and detained without their making any entry or other acknowledgment of the receipt. Hence in 1875, by a measure introduced by Sir John Lubbock but commonly known as Lopes' Act¹, it was made a misdemeanor, punishable with seven years' penal servitude, for a clerk or servant "wilfully, and with intent to defraud, to alter, or make a false entry² in, or omit a material particular from, any account of his master's." An indictment for this offence of false accounting is often useful where a clerk to whom a customer has paid money is suspected of stealing it, but no more can be actually proved than that he has never credited the customer with the amount. If, however, his books do shew correctly the sum which he ought to have in hand, the fact of his not really having that amount, ready to hand over, does not render the entry a "false" one within this statute.

Servants and clerks are far from being the only persons whose fiduciary position gives them opportunities for committing acts of dishonesty which, in the common law, were treated as deprived of legal criminality by those very circumstances of trust which aggravate their moral heinousness. We have already alluded³ to the case of an employer's being defrauded by some agent whose engagement has not placed him under such a control as would render him a "servant," and so bring him within the law of embezzlement. And a trustee, since he has possession, and even legal ownership, of the things he holds for his *cestui que trust*, could not by appropriating them commit any offence against the common law. It altogether ignored the existence of Trusts, even for civil purposes; not regarding a breach of trust as creating

¹ 38 Vict. c. 24.

² *E.g.* even tilting a taximeter-flag, so as to make the meter cease to record.

³ *Supra*, p. 231.

any debt, still less any crime. A dishonest trustee thus enjoyed in penal law an immunity as unreasonable as the extreme civil responsibility which equity, on the other hand, imposes upon even honest trustees if they prove complaisant or unbusinesslike.

Happily, in recent times, a much-needed extension of the criminal law has been effected in these respects. Thus, as to appropriation by agents, some limited provisions were initiated so far back as 1811; and have been expanded into a comprehensive form in the Larceny Act, 1916¹. This statute renders it a misdemeanor for any person fraudulently² to convert³ to his own use, or to that of any other person, any property—or the proceeds of any property—which he (whether solely or jointly with some other person) has been entrusted with:

either (a) for, or on account of, any other person⁴;

or (b) in order that it, or any part of it, or any proceeds of it, may be retained by him in safe custody⁵, or may be applied or paid or delivered by him for any purpose or to any person⁶.

Fraud is necessary. Pure carelessness, however gross, will not render an agent indictable; *e.g.* leaving the article in a railway carriage; or a commercial traveller's mistaking the amount he is entitled to deduct for journeying expenses. The maximum punishment of this misdemeanor is higher than that of simple larceny; being penal servitude for seven years;

¹ s. 20 (1) iv. It covers realty as well as personalty.

² *I.e.* fully and knowingly; cf. p. 239 n⁷.

³ Mere non-payment will not suffice.

⁴ *E.g.* even the entrustor himself; 16 Cr. App. R. at p. 189. It is enough that the offender meant to receive it for a third person, although the entrustor supposed him to be receiving it on his (the recipient's) own account; *i.e.* to be vendor, not vendor's agent; C. C. C. Sess. Pap. CLVI. 645.

⁵ *E.g.* furniture under a "hire and purchase" agreement. Not money, unless the identical coins are to be returned; 68 J. P. 143.

⁶ *E.g.* a lodger is sent by his landlady with £1 to pay her rates; or an estate-agent collects a tenant's rent; or a stockbroker receives from a client £100 to buy Consols with; or the weekly money for the alms folk is given to the almoner of the almshouse; or to a commission-agent goods to sell.

but a fine is possible¹. The enactment does not extend to mortgages of either real or personal property. Nor does it extend to "trustees on any express trust created by a deed or will." Most equitable owners must thus rely upon other clauses²; under which a trustee of either real or personal property is punishable with seven years' penal servitude, if, with intent to defraud, he converts or appropriates to any other purpose than that of his trust, any property which has been given to him on an express trust *created in writing*³. This extension of the criminal law to the protection of mere equitable ownership was originally an experiment so novel that it had to be restricted closely. Hence no trustee⁴ can be thus prosecuted without the leave of the Attorney-General, and if proceedings have already been begun in any civil court in respect of the breach of trust, the person who has taken them must obtain the leave of that court before beginning a criminal prosecution. Moreover, the criminal liability thus created is not to prejudice any agreement which the trustee may have entered into for making good the loss caused by his dishonesty. So that even a bargain by him to make restitution in consideration of not being prosecuted, would appear to be rendered enforceable, in spite of the ordinary rules as to contracts that are against public policy, and also unindictable, in spite of the ordinary rule against "compounding" a misdemeanor⁵. A remarkable clause in the Larceny Act of 1861 (s. 85), applying not only to trustees but also to agents and many other similar fiduciary misdemeanants, exempts them from criminal prosecution if the misdemeanor was first disclosed by them in the course of civil proceedings instituted against them by the person defrauded;

¹ The statute, by s. 20 (1) ii., similarly punishes the misdemeanor of any director or member or officer of a corporate body who fraudulently misappropriates any of the corporate property. It would apply even to a director who held all the shares in the company.

² Larceny Act, 1916, ss. 21, 46 (1); following the Larceny Act, 1861.

³ Implied trusts, and Oral trusts, are thus excluded; as too vague.

⁴ s. 21 (a) and (b).

⁵ *Infra*, p. 280.

but removes their privilege as to refusing to incriminate themselves when examined in these civil proceedings. Similarly, the offenders' disclosures in Bankruptcy proceedings are inadmissible as evidence against them on prosecutions for this peculiar group of misdemeanors (4 and 5 Geo. 5, c. 59, s. 166); cf. s. 43 (3) of the Larceny Act, 1916.

THE FORMS OF THEFT

It may be convenient, at this stage, to summarise the chief results which, step by step, we have arrived at, in discussing the historical development of the English law of theft. Four leading classes of cases must be carefully distinguished:

1. The owner gives up no rights at all; and the article is taken entirely without his consent. This clearly is Larceny.

2. The owner gives up physical possession (*i.e.* "custody"), though retaining legal possession; and then the custodian appropriates. This is Larceny, even at common law.

3. The owner gives up both physical and legal possession; and then the possessor appropriates. Here:

- (i) If possession were obtained *animo furandi*, then the fraud vitiates the consent, and there is a "Larceny by a trick." *E.g.* a plough is borrowed with intent to steal it; or a sovereign is handed to a cabman, who *knows* it has been given in mistake for a shilling.
- (ii) If possession were obtained *bonâ fide*, then the subsequent appropriation is no crime at common law.

But by statute, even if possession were obtained *bonâ fide*, yet if it had been obtained

- (a) by a clerk or servant, receiving for his master from a *third* person, appropriation by him is an Embezzlement;
- (b) by a bailee who is to deliver up the specific article, appropriation by him is a Larceny, under statute;

(c) by an agent who comes within the Larceny Act, 1916, appropriation by him is a misdemeanor of Fraudulent Conversion.

4. The owner gives up not only physical and legal possession, but also ownership. This cannot be a Larceny (either at common law or by statute), or an Embezzlement. But it may be the misdemeanor of an "Obtaining by false pretences¹," or of an appropriation by an Agent² or by a Trustee³.

Our account of the closely allied offences of common law larceny, statutory larceny, "quasi-larceny," and embezzlement, will have enabled the student to appreciate Mr Justice Wright's criticism that "The English law of criminal misappropriation has been...extended piecemeal, by fictions and by special legislation;...and the resulting mass is at once heterogeneous and incomplete⁴." The valuable consolidating Act of 1916⁵ is, we may hope, a basis for a really scientific reform such as was long ago attempted in the Parliamentary efforts of 1878-1880 to enact a Criminal Code. This code proposed to abandon the term Larceny and to replace it by that of "Theft"; which it defined⁶ as being—"Fraudulently, and without colour of right, taking or converting⁷ to the use of any person anything capable of being stolen, with intent"

¹ See p. 241.

² *Supra*, p. 236.

³ *Supra*, p. 237.

⁴ *Draft Criminal Code for Jamaica*, p. 110.

⁵ Which it is proposed to supplement by a like consolidation of the law relating to those minor thefts that are punishable only summarily.

⁶ See Stephen, *Hist. Cr. Law*, pp. 162-168. It is instructive to compare with this the definitions of Continental codes. *Italian Penal Code* of 1890, s. 402: "To possess oneself of a movable thing belonging to another person, for the purpose of deriving advantage from it, and take it away from the place where it is, without that person's consent." *German Penal Code* of 1870, s. 242: "To take away a movable thing which is not the taker's own, from some other person, with the intention of illegally appropriating it." Still briefer, though earlier, is the French definition (*Code Pénal*, s. 379), "Whoever has fraudulently taken away a thing which does not belong to him is guilty of theft."

⁷ Fraudulent Conversion was defined by Stephen, J., as "A conversion with no claim of right, and with the intention to deprive the owner of his property permanently"; 16 Cox 234.

(*inter alia*) "...to permanently deprive the owner, or any person having any special property or interest therein, of such thing or property or interest." And things capable of being stolen were made to include "all tame animals, all confined wild animals, and all inanimate things which either are, or may be made, movable (except things growing out of the earth and not worth more than a shilling)." No carrying away was to be required; and no change of possession; and the very act of rendering the thing movable might suffice to constitute a Theft.

CHAPTER XV

FALSE PRETENCES

THE common law, as we have seen, treated Dishonesty as a felonious crime only when it took the form of an actual-wrong to the owner's Possession¹. But it also regarded dishonesty as sufficiently affecting the public to be made criminal, though only in the degree of misdemeanor, whenever an owner had been induced to alienate his goods or money to some knave by using any permanent Thing that was calculated to deceive, not merely him, but people in general. The protection of public trade seemed to require this restraint upon the use of false weights, measures, hall-marks, or even dice. But it was no offence to get a man to pay money, or give away property, by a false Act, like shuffling genuine cards unfairly, or telling him some lie. When *A* got money from *B* by pretending that *C* had sent him for it, Lord Holt grimly asked, "Shall we indict a man for making a fool of another?" and bade the prosecutor to have recourse to a civil action². But a statutory provision for the punishment of mere private cheating was made in 1757; and is followed in the Larceny Act of 1916, under which it is an indictable misdemeanor to³ obtain from any person by any false pretence any chattel, money, or valuable security, with intent to defraud.

Under this enactment five points arise for our consideration: (1) the Right obtained, (2) the Thing which is the subject-matter of that right, (3) the Pretence, (4) its Effect, and (5) the Intent.

(1) *The Right*. The offence before us is committed when persons get goods dishonestly by fraudulently inducing the owner to make over to them at once the immediate ownership

¹ *Supra*, pp. 182-184.

² *Reg. v. Jones*, 1 Salk. 379. Cf. *Rex v. Wheatley*, 1 W. Bl. 273 (K. S. C. 2).

³ s. 32 (1).

in those goods. Indeed it is now established¹ that it is sufficient if the deliveror, without giving ownership, gives a power to pass the ownership. For a purchaser, buying under this power, will buy by authority of the owner.

We have already seen that for such persons the law of larceny provides no punishment. Sometimes, however, where frauds of this kind are attempted, they do unexpectedly turn out to be larcenies, because of some legal difficulty which has prevented the ownership from actually passing. One such difficulty may be that the deceit, which has been practised, related to facts so fundamental to the intended alienation that error as to them will render the transaction absolutely null and void, and thus prevent the supposed alienation from effecting any transfer of ownership at all. *A*, for instance, may obtain goods from *B* by personating *C*; or *A* may purchase goods from *B* on his own account, but with a secret intention never to pay for them². In such cases the carrying-off of the goods will, as we have seen, amount to "larceny by a trick." But wherever the alienation is not thus utterly void from the outset, there will be no larceny. And, in the great majority of cases of fraudulent obtaining, the fraud does not relate to a fundamental fact, but to some merely extraneous one, errors as to which do not render the transaction void but only voidable³. Ownership therefore passes in such cases, notwithstanding the false pretence; though the defrauded owner has a right to rescind the alienation and to cause the property to revert in him. Yet, even should he do so, this reversioning will have no retrospective operation on the thief's criminal liability; and thus will not convert his conduct into a larcenous taking⁴. Moreover even this right to rescind

¹ *Folkes v. King*, L. R. [1923] 1 K. B. 282; *Whitehorn Brothers v. Davison*, L. R. [1911] 1 K. B. 463. Contrast *Heap v. Motorists A. A.*, L. R. [1923] 1 K. B. 577; power merely to pass to a specified person who does not exist.

² *Rex v. Gilbert*, 1 Moody 185 (K. S. C. 353).

³ Anson on Contract, ch. vi. ss. 1, 2, 3; Pollock on Contract, ch. ix. pt. II.; Pollock and Wright on Possession, p. 100.

⁴ *Per Wills, J.*, in *Reg. v. Clarence*, 22 Q. B. D. at p. 27.

and revert will be extinguished if, before it has been exercised, the thief should dispose of the goods for valuable consideration to some innocent¹ purchaser; and, against such a purchaser, even an ultimate conviction of the offender will not suffice to revive the original owner's rights².

Another cause which may similarly defeat an intended alienation, and prevent ownership from passing, is that the person who attempted to alienate had not the legal power to do so. Thus if a man tries to obtain the property in goods by a fraud practised, not upon the owner himself, but upon his servant, and if that servant had only a limited authority to dispose of these goods, and one too limited to cover the transaction in question, then the carrying them off will be a larceny³. Hence, as a postmaster receives from London specific instructions for all "money orders" (unlike mere "postal orders") which he ought to cash, the money he pays on a forged money order is taken from him by a larceny. But, on the other hand, money paid by him on a forged "postal order" (with regard to which he receives no specific instructions), would become the property of the payee, and accordingly would be obtained by false pretences, and not by a larceny. (The general extent of the authority of Post Office servants to part with the moneys of the Postmaster-General has not yet been precisely settled; *e.g.* it is uncertain whether it covers payments made by them by spontaneous mistake⁴.) And as every bank cashier has a full and general authority to part with the money entrusted to him by his employer for the purposes of business, it follows that any coins paid by him in cashing a forged cheque become the property of the recipient. The latter, therefore, obtains them by false pretences and does not commit larceny.

It is not essential that the right obtained should be that

¹ And the purchaser will not have to prove his innocence; the owner must disprove it.

² Sale of Goods Act, 1893 (56 and 57 Vict. c. 71, s. 24 (2)).

³ *Reg. v. Stewart*, 1 Cox 174.

⁴ *Reg. v. Middleton*, L. R. 2 C. C. R. 38 (K. S. C. 266).

of a full ownership. It consequently appears to be sufficient for this offence that the victim is deprived of his whole¹ indefeasible interest in the thing, even though he be no more than a bailee². Hence the owner himself may be convicted of obtaining the thing from his bailee by false pretences³. But apparently the offence cannot be committed by obtaining a bare right, without delivery (either actual or constructive). But manual possession is unnecessary; transfer of control suffices; cf. p. 254. Yet there is no decision, or even dictum, that would support an indictment for obtaining by false pretences when there has been no delivery. But so long as there has been a delivery, it is not necessary that it should have been made to the same person who made the false pretence. For s. 32 of the Larceny Act, 1916, makes it sufficient if the prisoner's pretence has caused a delivery or payment either to himself or "to any other person," whether for the prisoner's own use or anyone else's.

But in false pretences, just as in larceny, there must be an intention to deprive the injured owner of his whole interest (or of a right to divest that whole interest), and not merely to deprive him of the temporary use of his interest. Thus to obtain by fraud the loan of a horse for a day's ride does not come within the statute⁴. Objection has consequently been taken to the ruling in *Reg. v. Boulton*⁵—where a conviction was upheld for obtaining a railway ticket by false pretences—on the ground that the railway ticket is to be restored to the Company when the journey is over, and therefore that a full criminal "obtaining" of the property in it never took place. But surely a person who, on abandoning his idea of making the journey, destroys his ticket, does not infringe any

¹ Obtaining an undivided share with him does not suffice; D. and B. 348.

² Cf. p. 197 *supra*.

³ *Reg. v. Martin*, 8 Ad. and E. at pp. 485, 488.

⁴ *Reg. v. Kilham*, L. R. 1 C. C. R. 261 (K. S. C. 243). Cf. p. 211 *supra*. A so-called "loan" of money is not a *commodatum* but a *mutuum*, and so does pass the entire ownership.

⁵ 1 Den. 508; followed in *Rex v. Chapman*, 4 Cr. App. R. 276.

right of the railway company. If so, their only right must be a merely contractual one, against him alone, (*viz.* a right that, *if* he should actually take the journey, he will give up the ticket to them); and not a right of ownership in the ticket itself.

(2) *The Thing*. What we have just said suffices to shew that the legal distinction between larceny and a mere obtaining by false pretences is often hard to trace. The two offences being so closely akin, it is not surprising that the technicalities of the older one—as, for instance, with regard to the subject-matters capable of being stolen—should have affected even the more modern of the two. Thus an indictment for obtaining by false pretences will not lie unless the thing obtained were either (1) money or (2) a valuable security, or else (3) such a chattel as was a subject of larceny at common law¹. Thus the offence does not include a fraudulent obtaining of real property, or of anything “savouring” of the realty², or of those chattels which are considered as of insufficient value for larceny (*e.g.* dogs); yet a railway ticket, in spite of its being evidence of a mere chose in action (*supra*, p. 202), may be the subject of an indictment for obtaining it by false pretences³. So, again, if what was obtained by the false pretence were not a Thing at all, but only the enjoyment of lodgings⁴ or an Act of service, the offence is not committed; as where a man secures a ride in a train by saying, “I am a season-ticket holder.” (It may, however, be noted that under the London Cab Act, 1896⁵, it is a specific petty offence, punishable on summary conviction, to hire a cab *in London* with intent to avoid payment of the lawful fare. And the Larceny Act, 1916, by s. 32, makes it an indictable misdemeanor to procure by false pretences the execution of any valuable security.)

¹ *Supra*, pp. 198–204.

² *Reg. v. Pinchbeck*, C. C. C. Sess. Pap. cxxxiii. 205 (K. S. C. 355); *Reg. v. Robinson*, Bell 35 (K. S. C. 357).

³ *Reg. v. Boulton*, *supra*, p. 244 n.

⁴ 17 Cr. App. R. 162.

⁵ 59 and 60 Vict. c. 27.

(8) *The Pretence.* The false representation may operate either by fear of detriment or by hope of benefit. It may be made expressly in words (either written¹ or spoken); but it is quite sufficient that it can be even implied from them, or from mere silent conduct. But the words or the conduct must be fairly capable of conveying the false meaning; and must moreover have been intended² to convey it. (Yet in a *commercial* court it would be no defence to say "I never meant that construction to be put on my words.") Thus for a mere huckster to give an order for goods to an extent so great that only a man in a very large way of business could require them, may amount to a false pretence; and so may the packing up of goods made by yourself in wrappers closely resembling those used by some well-known firm of manufacturers³. Again, without any deceptive words at all, the mere act of wearing a cap and gown, in a University town, may be enough to constitute a representation that you are a member of its University⁴. Similarly, quite apart from the use of any words asserting the genuineness of the article, there would be a false representation in passing a note of a wound-up bank; or, again, in offering for sale a sparrow painted as a canary (such as the late Lord Justice Mathew described to be a "gaol-bird")⁵.

The pretence must relate to some fact that is either past or present. A statement purely affecting the future will not suffice. For all future events are obviously matters of conjecture, upon which every person should exercise his own

¹ Even *written* words must be construed by the jury, not the judge.

² As where a hawker of rings announces them as "all marked" meaning his hearers to understand "hall-marked." Or where a man at Tottenham, who had served three terms of penal servitude, set up as a builder, and (with literal truth yet with intentional deceit) headed his letter-paper: "Employed fourteen years in Government work."

³ To use a false name in order to defraud by denying your identity is indictable; but not if used merely to conceal identity, e.g. a trade name or stage-name.

⁴ *Rex v. Barnard*, 7 C. and P. 784 (K. S. C. 333).

⁵ Or in offering, for sale, stolen goods; *Re Pinter*, 17 Cox 498. Cf. 17 C. B., N. S. 723. But none in merely overcharging, where there is no fixed price; 13 Cr. App. R. 170. As to vendors who conceal incumbrances, see p. 541 *infra*.

judgment. If the buyer says, "Send me the meat and I will pay to-morrow," it is for the butcher to determine whether he will part with the meat on the strength of this promise. If, therefore, the customer fails to fulfil his promise, the butcher cannot prosecute him for obtaining the meat by false pretences, but can only sue him in a civil action to recover the price of it. In like manner, to borrow money under the pretence that you will use it in paying your rent, is not an obtaining by such a false pretence as will come within the statute. This distinction between Present and Future is, however, now being undermined by the principle that representations, which do not expressly mention anything but the future, may nevertheless imply a representation about the present; viz. a representation that the existing state of affairs is such that, in the ordinary course of events, the future occurrence mentioned will take place. Thus it has been held that sending the half of a bank-note, along with an order for goods, is not merely a promise that on a subsequent occasion the other half shall be sent, but implies also a representation that at the present time the sender already possesses that other half¹. Similarly the familiar act of drawing a cheque—a document which on the face of it is only a command of a future act—is held² to imply at least three statements about the present:

- (1) That the drawer has an account with that bank;
- (2) That he has authority to draw on it for that amount;
- (3) That the cheque, as drawn, is a valid order for the payment of that amount (*i.e.* that the present state of affairs is such that, in the ordinary course of events,

¹ *Reg. v. Murphy*, Ir. Rep. 10 C. L. 508 (K. S. C. 338). "I will deliver the article" may thus involve representations that "I am now in a position to be then able to deliver it," and that "I now intend to deliver it." Cf. L. R. [1896] A. C. at p. 284.

² *Reg. v. Hazelton*, L. R. 2 C. C. R. 134 (K. S. C. 336). The doctrine probably applies even to *post-dated* cheques. But in Australia (13 N. S. W. 410) and Canada (11 Can. Cr. Ca. 279) they are held to be merely representations about the Future.

the cheque will on its future presentment be duly honoured).

It may be well to point out, however, that it does not imply any representation that the drawer now has money in this bank to the amount drawn for; inasmuch as he may well have authority to overdraw, or may intend to pay in (before the cheque can be presented) sufficient money to meet it¹.

It has sometimes been suggested that when a man orders a meal at a restaurant he impliedly makes a representation as to his present ability, and present intention, to pay for it. But to treat every order for goods as if it impliedly contained the words, "I can pay," would render it dangerously easy for disappointed creditors to call in the law of False Pretences to the assistance of the law of Debt. Accordingly it is now settled² that the penniless man, who orders and eats a meal at a restaurant, does not thereby make any implied false statement about the present. But though his deceit relates only to the future, it is enough to constitute an "obtaining credit by fraud in incurring a liability" (which is a specific statutory misdemeanor under the Debtors Act, 1869³); although the credit given by the innkeeper was to last only until the end of the meal.

Where it is by the joint operation of several representations, that the prisoner has induced the owner to part with his property, the offence may be committed, even although some of them were mere promises about the future, if any one representation was as to a present fact. In other words, it is sufficient that the false representation of present fact was essential to the transaction; even though it alone would not have been enough to induce the owner to part with his

¹ That the covenants for title in a conveyance of realty imply no indictable pretence, see *Reg. v. Marriott* (*The Times*, Aug. 10, 1863).

² *Reg. v. Jones*, L. R. [1898] 1 Q. B. 119.

³ 32 and 33 Vict. c. 62, s. 13. Its maximum punishment is only a year's imprisonment, with hard labour. This enactment is useful where there is either (1) a "fraud" which is not a "false pretence," e.g. by mere reticence, as in *Reg. v. Jones*, or (2) "credit" not on alienation, but on a bailment, or for services, or for lodgings.

property. Thus if a married man represents himself as unmarried, and proposes marriage to a woman, and thereupon obtains money from her for the pretended purpose of furnishing their house, he may be convicted of obtaining this money by false pretences¹.

Again, even in the case of statements which clearly relate only to the present, it is often hard to say whether they are statements as to actual Facts or merely as to matters of Opinion; as in the case of a vendor's exaggerated eulogies of his wares. For in English law, as in Roman², the license of trade has established as to "dealers' talk" the lax rule that "Simplex commendatio non obligat." In all bargaining there is usually a conflict between the two parties, in commercial skill and general experience; and it would be perilous to employ the criminal law to regulate this conflict. For a man to represent himself as having "a good business," when he carries on no business at all, is clearly a false statement of a definite Fact. But a similar representation made by a man who has a business, however poor a one, will generally be a mere matter of Opinion³. A seller's misrepresentation of the weight of a sack of corn will concern mere matter of opinion, if the sale is for a lump sum; but will concern a fact so fundamental as to render it indictable, if the sale is by weight⁴. In the same way, to falsely represent an article as being silver—or to represent a chain as being of 15 carat gold, when it is really only 6 carat⁵—is a false pretence of fact; the real article being different in *substance* from the pretended article. Yet to represent plated spoons as being "equal to Elkington's A," has been held to be only exaggerated praise, a mere puffing⁶; inasmuch as the person deceived did get plated

¹ *Reg. v. Jennison*, L. and C. 157 (K. S. C. 324).

² Justinian's *Digest*, iv. 3. 37; cf. Benjamin on Sales, III. ii. 1.

³ *Reg. v. Williamson*, 11 Cox 328. Yet contrast *Reg. v. Cooper*, L. R. 2 Q. B. D. 510 (K. S. C. 333).

⁴ *Reg. v. Ridgway*, 3 F. and F. 858.

⁵ *Reg. v. Ardley*, L. R. 1 C. C. R. 301 (K. S. C. 331).

⁶ In mercantile law, statements of Quality may be (1) mere "Puffing," (2) Representations inducing a contract, (3) Estoppels, (4) Warranties, (5) Integral Terms of a contract, or (6) Conditions Precedent.

spoons, differing only in *value* from what he had been led to expect¹.

It seems² that even mere states of mind are to be regarded as "Facts" within the definition of the offence; so that an indictment will lie against a man for obtaining goods by a false statement of his present intention to do a given future act. In *Reg. v. Gordon*³, Mr Justice Wills inclined to think that such a merely mental fact would suffice. This accords with the celebrated dictum of Lord Bowen that "the state of a man's mind is just as much a fact as the state of his digestion⁴." But if such expressions of Intention are to be recognised as sufficient pretences, it will often be hard to distinguish between them and mere Promises, which (as we have seen⁵) are not sufficient.

(4) *The Effect*. The change of ownership must not merely have been preceded by a false pretence, but also have been actually *caused* by it, wholly or at any rate⁶ in material part. The counsel for the crown should not omit to put an express question as to this⁷. When a shopkeeper is actually delivering goods on credit to *A*, no offence is created if *A* should *then* say falsely, "I am the Earl of Z⁸." Nor if the buyer of a sham gem relied, not on the seller's false assurance but on

¹ *Reg. v. Bryan*, D. and B. 265 (K. S. C. 328).

² Cf. *Rex v. Bancroft*, 3 Cr. App. R. 16; and see p. 302 *infra*. In *Hunt v. Battersby* (*The Times*, April 16, 1920) a railway-servant obtained "for the use of my wife" a privilege-ticket to which he was entitled for his wife but not for any one else. A Divisional Court held that there was a criminal false pretence. Lord Reading, L.C.J., said that the man had "the *intention* in his mind, at that time, to use the ticket for a person other than his wife. It was a false statement that he *wanted* the ticket for his wife." Avory, J., said "The false pretence was a pretence that the man *bonâ fide* required the ticket for his wife. Leaving out any intention, that was the false pretence of an existing fact."

³ L. R. 23 Q. B. D. 354 (K. S. C. 326). Cf. *Reg. v. Jones* (6 Cox 47) and the remarks of Hawkins, J., in *Reg. v. Pockett* (*The Times*, May 14 and 18, 1896).

⁴ L. R. 29 Ch. D. 483; cf. *Angus v. Clifford*, L. R. [1891] 2 Ch. D. at p. 470.

⁵ *Supra*, p. 247.

⁶ D. and B. 578.

⁷ For the actuation should be proved by direct evidence, not by mere inference from business-ways; *Rex v. Dargue*, 6 Cr. App. R. 261.

⁸ Cf. *Reg. v. Martin*, 1 F. and F. 501 (K. S. C. 339).

the (incorrect) report of a jeweller whom he consulted. Similarly, if a false representation had been actually made by the prisoner to the prosecutor's agents, but the agents never communicated it to the principal before he parted with his goods (so that it was not by it that he was led to act), there must be an acquittal. The same principle applies wherever the pretence did not in fact deceive the person to whom it was made; as in the frequent instances where, on the advice of the police, the recipients of a begging letter send money to the writer of it, in order to expose him. (In such cases, however, the prisoner may nevertheless be guilty of an Attempt to obtain by false pretences—which is (*supra*, p. 84) a common law misdemeanor.) If, however, the person was in fact actuated by the false pretence, it does not matter how credulous or how careless he may have been in accepting it; as where the defrauder professed to have the magical power of bringing back a missing person “over hedges and ditches¹.”

Even, however, where there is a causal connexion between the pretence and the obtaining, the law will refuse to take cognisance of this causation if it be too remote². But mere lapse of time does not necessarily amount to remoteness. And if the delivery of the article obtained was the object and aim of the false pretence³, there will be a sufficiently direct connexion between the pretence and the obtaining, even though what was obtained immediately by the false pretence was not the delivery but merely a contract, the ultimate execution of which produced the delivery⁴. And this, even though the thing delivered was not in existence at the time of the pretence⁵. In the case of races, if a competitor, by making a false statement of his previous performances, obtain an undue allowance in a handicap, and thereby win a prize,

¹ *Reg. v. Giles*, L. and C. 502.

² Cf. *supra*, p. 81.

³ Even if there was no express request for the article, the jury may still find that there was an implied one.

⁴ *Rex v. Moreton*, 8 Cr. App. R. 214.

⁵ *Reg. v. Martin*, L. R. 1 C. C. R. 56 (K. S. C. 344).

such a false pretence will not be too remote from the obtaining of the prize to be indictable¹. Had he not won the prize, the running the race would still have been indictable as an attempt to obtain the prize by false pretences; though merely entering for the race, without running, would probably have been too remote an act to constitute even an attempt.

(5) *The Intent*. It is not enough that the false pretence did obtain the thing, it must have been made with the purpose of obtaining, and of obtaining by Defrauding (*e.g.* not simply to rescue your own chattel from a wrongful possessor, or to get it as a joke and then promptly return it, or to hold it as security for a genuine debt). And it must moreover have been made, not by honest mistake, but with knowledge of (or *perhaps*² recklessness about) its falsity³; *e.g.* not merely by carelessly signing a paper without reading it. The offender's mere intention ultimately to make good the loss *if* he can, does not displace Fraud⁴.

Although the statutory offence of obtaining by false pretences is, as we have seen, only a misdemeanor, it is punishable as severely as petty larceny: viz. with penal servitude for not more than five years or less than three, or imprisonment, with or without hard labour, for not more than two years or (unlike larceny) with a fine⁵. After the famous Tichborne case, an Act was passed (37 and 38 Vict. c. 36) making false *personation*, for the purpose of obtaining either personal or real property (whether the property be actually obtained or not), a felony, punishable with penal servitude for life. An applicant for a policy of life insurance has been

¹ *Reg. v. Button*, L. R. [1900] 2 Q. B. 597 (K. S. C. 342). See p. 541 *infra*.

² No criminal court has, as yet, decided this: but see L. R. [1884] 9 A. C. at p. 203, and L. R. [1889] 14 A. C. at p. 374. In a civil action of Deceit recklessness does suffice; see L. R. 4 H. L. at p. 79, and 14 A. C. at p. 368.

³ Such knowledge is *prima facie* evidence of intent to defraud.

⁴ Even if it be likely that he ultimately *will* be able; 22 Cox, 624. See *Reg. v. Naylor*, L. R. 1 C. C. R. 4; cf. 25 Cox 145. Lord Darling has expressed the opinion that an indictment would lie for defrauding even an intending criminal; as by selling him, for a poison, a harmless drug; 63 J. P. 790.

⁵ Larceny Act, 1916, ss. 32, 37 (4), 37 (5 a).

known to send for the medical examination another and healthier man to personate him.

On an indictment for false pretences, a prisoner may now be convicted—and convicted of that very misdemeanor—even though his offence be shewn to have really constituted a larceny; whilst on an indictment for larceny he may be convicted of false pretences¹. The subtle distinctions between the two crimes have thus lost much of their practical importance.

A restitution order² may be had against the actual offender, or his *malâ fide* sub-purchaser, by any prosecutor who has actually become again the owner, *i.e.* who has legally rescinded the transfer. But the Sale of Goods Act, 1893 (56 and 57 Vict. c. 71, s. 24), provides that conviction for frauds not amounting to larceny shall not³ produce such a reversioning as to defeat intermediate *bonâ fide* sales. Hence the courts are chary of granting restitution orders in cases of false pretences, for fear there may have been such a sale.

THE RECEIVING OF STOLEN PROPERTY

Having now completed our view of the various crimes by which an owner may be dishonestly deprived of his chattels, we may supplement it by an account of a crime that is likely to be committed in the course of the subsequent disposition of that property.

At common law the receiving of stolen goods with knowledge that they had been stolen was a mere misdemeanor. It was necessary that a larceny of the goods should have been committed; yet the receiver was not indictable as an accessory after the fact to this larceny (unless the receiving in some way assisted the thief's escape from justice), because it was

¹ *Infra*, pp. 469–470.

² *Supra*, pp. 224–227.

³ Cf. Larceny Act, 1916, s. 45 (2). But if, though the conviction were for False Pretences, the evidence established Larceny, the ownership does t; 65 J. P. 729; so a restitution order can be made.

not the thief, but only the goods, that he received. Subsequently, however, by various statutes (whose provisions are now comprised in the Larceny Act, 1916¹), the scope of the offence was greatly widened; by extending it to cases where the original act of dishonesty was a stealing or obtaining of the property "in any way whatsoever under circumstances which amounted to felony or misdemeanor." As to receiving the proceeds of a *non-indictable* theft, see the Act of 1861, *infra*, p. 256.

The offence thus consists of "receiving² stolen goods³, knowing them to have been stolen." This involves three points for consideration: (1) the receiving, (2) the thing received, (3) the guilty knowledge.

(1) There must have been some act of "receiving"; which involves a change of possession. It must therefore be shewn that the prisoner took the goods into his possession, actual or constructive. This cannot be the case so long as the original thief retains exclusive possession of them (though there may well be an amicable joint possession by a receiver and a thief together). But, as in all cases of possession, a person may "receive" without himself taking part in any physical act of receipt. Accordingly if stolen goods are delivered to the prisoner's servant, or wife, in his absence, but he afterwards does some act that implies an acceptance of the goods—as by removing them to some other part of his premises, or by striking a bargain about them with the thief⁴—he will then (though not till then) become himself a "receiver" of them. The mere fact that stolen jewels are in a man's house does not make his wife a constructive possessor of them; it is not as if she were wearing them⁵.

¹ s. 33 (1).

² For any purpose, even mere temporary custody or carrying. But an *innocent aim* excuses; *e.g.* to restore the goods to the owner, or to entrap the thief. As to goods stolen abroad, see p. 420 *infra*.

³ Not the mere *proceeds* of stolen goods; 6 Cr. App. R. 112.

⁴ *Reg. v. Woodward*, L. and C. 122 (K. S. C. 364).

⁵ See C. C. C. Sess. Pap. CL. 295.

(2) It is also necessary that the goods received should have already been stolen¹, antecedently to the act of receiving. Hence a man cannot become a receiver of stolen goods by himself committing the act of stealing them. Moreover, the character of being "stolen goods" is only a temporary one. For if, after being stolen, the goods happen to return into the possession (actual or even constructive) of their owner, such a return will deprive them of the character of stolen property; so that there will not be any crime in subsequently receiving them. This rule often defeats measures which have been taken by an owner, after detecting a theft, in hopes of entrapping and punishing some expected receiver.

(3) Finally, the prisoner must have received the stolen goods with knowledge *then*² of their having been stolen (not knowledge obtained merely after taking possession). Such knowledge may be presumed, *primâ facie*, if he knew of circumstances so suspicious as to convince any reasonable man that the goods had been stolen—*e.g.* when an unlikely vendor offers them for an unlikely price at an unlikely hour³. His subsequent conduct may be evidence of such knowledge; *e.g.* his hiding the goods, or selling them surreptitiously and over-cheaply, or making no written entry of having bought them.

As to the punishment of receivers, the main provisions of the Larceny Acts, 1861 and 1916, are as follows:

1. If the original stealing or obtaining was a felony, the receiver is guilty of a felony. The maximum punishment is fourteen years' penal servitude; a boy under sixteen may,

¹ As to *proof* of the theft, see *Rex v. Sbarra*, 13 Cr. App. R. 118.

² *Rex v. Johnson*, 6 Cr. App. R. 218. Retaining is not Receiving.

³ Actual certainty is not necessary; 1 F. and F. 665. *Wills' Circumstantial Evidence*, p. 76; L. R. [1892] A. C. 287. But negligence (or even Recklessness) in not realising their having been stolen will not create guilt; he must have shut his eyes *wilfully* to facts from which ordinary men would realize it clearly; cf. 11 Cr. App. R. 2; and C. C. C. Sess. Pap. cxi.viii. 232. See p. 362 *infra* as to statutory evidence of Knowledge.

in addition, be once privately whipped. (Sec. 33 (1) of the Larceny Act, 1916.)

2. If the original stealing or obtaining was a misdemeanor (*e.g.* if the goods had been obtained by false pretences), the receiving is a misdemeanor; and punishable with a maximum punishment of seven years' penal servitude. A boy under sixteen may, in addition, be once privately whipped. (Sec. 33 (1) of the Larceny Act, 1916.)

3. If the original stealing was, by the Larceny Act of 1861, a petty offence punishable on summary conviction (*e.g.* if the thing stolen were only a dog), the receiving is only a similar offence; and is punishable just as the stealing itself is. (Sec. 97 of the Larceny Act, 1861.)

CHAPTER XVI

FORGERY

THE verb "to forge," which originally meant simply "to make," acquired early, even before the time of Shakespeare, the special sense of making deceitfully¹. (The cognate verb "to fabricate" has passed through a similar development.) Forgery, accordingly, is the offence of "making a false document in order that it may be used as genuine²," or, similarly, of counterfeiting certain seals or dies or the impressions of them; with an unlawful intent.

Though at first sight this might seem a crime not likely to be prevalent except in an age of commercial activity, yet it had already become quite a common offence in England as early as the fourteenth century. And it was not regarded as a heinous one. Thus a man who had forged a conveyance of lands in the name of a deceased person was merely fined 13s. 4d.³ For the common law treated it only as a misdemeanor, punishable with fine and imprisonment. But, in proportion as the increase of education and the development of commerce multiplied the opportunities for committing acts of forgery, it became necessary to restrain heinous ones by more stringent penalties. Accordingly, by a succession of statutes, now consolidated in the Forgery Act, 1913 (3 and 4 Geo. V. c. 27), many classes of instruments have been covered with a special protection, by making the forging of any of them a felony. Moreover, this statute re-enacts a comprehensive provision (s. 7), making it a felony punishable with fourteen years' penal servitude, to *obtain money or property* (or even endeavour to obtain it) by "*any forged instrument whatsoever, with intent to defraud.*" Accordingly

¹ See Dr Murray's *English Dictionary*.

² 3 and 4 Geo. V. c. 27, s. 1 (1); Stephen, *Hist. Cr. Law*, III. 180-186.

³ *Kentish Eyre* of 1313, p. lxxi; cf. Mr Pike's Y. B. 20 Edw. III. p. l.

to send even a false telegram, or tamper with a postmark, with the view of wrongfully obtaining money thereby, will be a felony¹.

We must consider (1) the Document, (2) the Falsity, (3) the Making, (4) the Intent.

(1) The words "Document," or "Instrument," will² cover any writing the falsification whereof can prejudice any person³. Accordingly the forgery of very many instruments not comprised in the definitions of any of the numerous statutory felonies is punishable; for instance, certificates of Holy Orders, theatre tickets⁴, and ordinary unsealed written contracts. Thus not only deeds and similar important instruments are protected by the law of Forgery, but also mere letters of recommendation by which employment or other pecuniary advantage is sought, or certificates of identity for obtaining a passport⁵. A letter to a man who really owed money to the forger, falsely purporting to be written by his employer and urging him to pay the debt promptly, has been held a sufficient document⁶. And so is a mere letter to a gaoler, requesting leave to confer with a prisoner but falsely purporting to be written by his solicitor⁷. "It is immaterial in what language the document is expressed; or in what place, within or without the King's dominions, it is expressed to take effect⁸."

Yet a picture is not a document. Hence it is no forgery to put on a picture the false signature of some famous painter; for the painter's signature gives no legal efficacy⁹, but is a mere identificatory mark. The imitation of any trademark,

¹ *Reg. v. Riley*, L. R. [1896] 1 Q. B. 309 (K. S. C. 179).

² Here the two words are synonymous (*Rex v. Cade*, L. R. [1914] 2 K. B. 209); but "Instrument" is sometimes narrowed to such documents as affect legal rights. As to *inchoate* documents, see L. R. 7 Q. B. D. 79.

³ I.e. by prejudicing him in any "business relation"; even though it one not enforceable legally, e.g. a bet.

⁴ *Reg. v. Bennett*, C. C. C. Sess. Pap. LXXIII. 94.

⁵ *Reg. v. Barrow*, C. C. C. Sess. Pap. c. 644.

⁶ *Rex v. Parker*, 74 J. P. 208. Cf. *Rex v. James* (*Times*, Jan. 16, 1897) bc

⁷ *Rex v. Barrett*, C. C. C. Sess. Pap. CXXX. 797.

⁸ Forgery Act, 1913, s. 1 (3 a).

⁹ *Reg. v. Closs*, D. and B. 460 (K. S. C. 184).

accordingly, was not a forgery, until specifically made a misdemeanor by statute¹. Similarly, when a man pays his bill in a shop with a bank-note and some sovereigns, although he would commit a forgery if he were to put on the back of the note the name of some well-known capitalist, yet there would be no forgery in his scratching the same name on the sovereigns.

So, again, whilst it is forgery to fabricate a postage-stamp for actual use, or to eradicate from a used stamp the Post Office's cancelling marks, it is not a common-law forgery to make what purports to be an already-used stamp, for sale as a curiosity; but it is forgery by the Stamp Act².

(2) A document is a "false" one, whenever the forgery causes it to have an effect which the person executing it does not desire to produce, or an effect which (though he does desire to produce it) he cannot legally produce. Accordingly an instrument is not a forgery when it merely contains statements which are false, but only when it falsely purports to *be* itself that which it is not³. Hence a conveyance which contains false recitals, or exaggerates the price paid, is not rendered thereby a forgery. A telegram to a newspaper is forged if it is sent falsely in the official reporter's name; but not if it merely sends untrue news⁴. Thus a forgery is a document which not only tells a lie, but tells a lie about itself. The commonest case is where it "purports to be made by or on behalf of a person who did not make it nor authorise its making⁵."

Again, an instrument's mis-statement of the time or place of making it, will render it false *if* that time or place be material⁶ to its operation (and, similarly, too, will the mis-statement of any distinguishing mark—like the number on a debenture—which identifies the instrument). So the fraudu-

¹ See, now, the Merchandise Marks Act, 1887 (50 and 51 Vict. c. 28).

² See 9 Cr. App. R. 195; *Rex v. Jeffreys*, C. C. Sess. Pap. cxv. 575.

³ *Reg. v. Ritson*, L. R. 1 C. C. R. 200 (K. S. C. 188).

⁴ *Rex v. Horner*, 74 J. P. 216.

⁵ Forgery Act, 1913, s. 1 (2).

⁶ *Ibid.* E.g. in a railway-ticket.

lent antedating of a cheque is forgery. And if a telegraph clerk, immediately on hearing the result of a race, despatches to a bookmaker a telegram backing the winning horse, and purporting to have been handed in at the post office before the race was run—*i.e.* in time to make a genuine bet—he commits a forgery¹. Again, a person, to whom a merely limited authority to act as agent has been given, may commit forgery by exceeding this authority. Thus if a servant, to whom £2 are due for wages, receives from his employers a cheque in his own favour, duly signed but with the amount left blank, and is told to fill it up for the £2, he will become guilty of forgery if he fills it up for £3². But it is otherwise if the agent has a general authority; or if, though he has merely a limited authority, he makes only such a document as comes within the limit. Accordingly if, when a blank signed cheque has been entrusted to a man, with authority to fill it up for an amount to be calculated by him, he fills it up for that amount correctly, but wrongfully goes on to cash it and to appropriate the proceeds, his crime is not a forgery³.

A document may tell a sufficient falsehood about itself even by mere implication. Thus falsity may be produced by making a document in the name of an imaginary or of a deceased person⁴; or even by making it in your own name but with the intention that it shall pass as made by some one else⁵, as where a man indorses a bill which was remitted to some other person of his name, but by mistake came to him instead⁶. In all these cases there is a forgery; for one person makes a writing which represents itself as the act of some other person (real or fictitious). But when a man puts forward a document as emanating, not from any other person, but strictly from himself, it will not be rendered false by his

¹ *Reg. v. Riley*, L. R. [1896] 1 Q. B. 309 (K. S. C. 179).

² *Reg. v. Bateman*, 1 Cox 186 (K. S. C. 191).

³ *Ibid.*

⁴ *Rex v. Lewis*, Foster 116 (K. S. C. 195); Forgery Act, 1913, s. 1 (2 b).

⁵ Forgery Act, 1913, s. 1 (2 c). Cf. p. 542 *infra*.

⁶ *Mead v. Young*, 4 T. R. 28 (K. S. C. 197); *Rex v. Parkes*, 2 Leach 775.

adopting an assumed name in his signature to it, for it still is to him and no one else that credit is given¹.

(3) The act of “making” a false document may be committed either (i) by affixing to it a seal or a stamp, or altering one that is already on it or (ii) by either writing, or erasing², in the document itself, any material words or letters or figures, even though they do not constitute the whole of the document but only a part of it³ (*e.g.* the signature, or even the crossing⁴, of a cheque). There may even be a forgery by a mere inactive omission, provided that the words omitted would have qualified the operation of those that remained; as where an amanuensis, when taking down a will from a testator’s dictation, fraudulently omits a condition attached to one of the legacies⁵. And the offence of Forgery⁶ “may be complete even if the document, when forged, is incomplete; or is not, or does not purport to be, such a document as would be binding in law”—*e.g.* an *unstamped* promissory note.

A man may be guilty of forging a document even though no part of it was actually written by him. Thus the written transcript of a telegraphic message, made out at the arrival office, is made by the hand of a purely innocent agent⁷, the post office clerk; but the sender of the telegram is as much responsible for it as if he had written it with his own hand⁸. Yet it is not forgery merely to use fraud (however gross) to procure the execution of a document, *e.g.* to get a man to sign it by misrepresenting to him its contents⁹. Such conduct, however, is a statutory misdemeanor¹⁰, punishable with five years’ penal servitude. And it may well be contended that

¹ Cf. p. 246 n. *supra*.

² *E.g.* rubbing out items in the bill at a teashop, before paying.

³ Forgery Act, 1913, s. 1 (2 a).

⁴ Forgery Act, 1913, s. 1 (3 c).

⁵ 1 Hawkins P. C. p. 265.

⁶ Forgery Act, 1913, s. 1 (3 b).

⁷ Cf. p. 85 *supra*.

⁸ *Reg. v. Riley*, L. R. [1896] 1 Q. B. 309 (K. S. C. 179).

⁹ *Reg. v. Chadwick*, 2 M. and R. 545.

¹⁰ Larceny Act, 1916, s. 32 (2): “fraudulently inducing by a false pretence the execution of a valuable security.” All instruments of title, either to land or to goods, are here included as “valuable securities”; see s. 46.

in all those cases where the deceived person—as where he is blind or illiterate¹—is entitled to repudiate the instrument as not his genuine act, the fraudulent author of this false document is guilty of Forgery, through an innocent agent².

If a document is not *itself* false in any way, the mere fact of putting it to a fraudulent use will not make it a forgery. Thus where wrappers were printed in imitation of those used by a well-known firm, but the goods of a less famous firm were packed in them for sale, the mere printing of these wrappers was held not to constitute a forgery³. (But the actual use of them in trade would involve the crime of an attempt to obtain money by false pretences.)

(4) It only remains to consider whether it is necessary that the forger should have had any specific form of *mens rea* in deceitfully making the false document. At common law it was necessary that he should intend not merely to deceive but also to defraud⁴ thereby—to prejudice some one by inducing him to alter (or abstain from altering) his rights, though not necessarily to his actual pecuniary loss. But the statute law has specified many kinds of instruments which it makes it criminal to forge even for the purpose of merely deceiving, without any intention of defrauding. This, for instance, is the case with every *public* document⁵ (e.g. a nomination paper or ballot paper for a Parliamentary or municipal election); and thus with marriage licences and the documents or registers of any court of justice⁶; with registers (or certificates) of births, baptisms, marriages, deaths, burials,

¹ But as to normal men the law is not clear. See *Howatson v. Webb*, L. R. [1908] 1 Ch. 1; *Carlisle C. B. Co. v. Bragg*, L. R. [1911] 1 K. B. 489; *Pollock on Contract*, ch. ix. pt. II, A; *Kenny's Contract Cases*, p. 223.

² See Stephen (*Dig. Cr. Law*, Art. 385) on *Reg. v. Collins*, 2 M. and R. 461. Cf. 4 American State Rep. 848.

³ *Reg. v. Smith*, D. and B. 566 (K. S. C. 186).

⁴ *Reg. v. Hodgson*, D. and B. 3 (K. S. C. 202).

⁵ Forgery Act, 1913, s. 4 (2). Two years' imprisonment with hard labour and a fine is the maximum punishment; except for those especially important ones which it is made felony to forge.

⁶ *Ibid.* s. 3 (3). Felony: seven years' penal servitude.

or cremations¹; and with documents that bear a royal seal or sign-manual². It similarly is made an offence to forge a telegram³—*e.g.* to send one so signed as to purport to come from an existing⁴ person other than the actual sender—even though the object in view be not to defraud, but merely to obtain the joy of hoaxing the recipient. See p. 259 *supra*.

In most forgeries, however, an intention to defraud is necessary⁵. Thus there is a comprehensive provision⁶ in the Forgery Act, 1913, s. 4 (1), that "Forgery of any document which is not made felony...[by statute]...if committed with intent to defraud shall be a misdemeanor; and punishable with imprisonment with or without hard labour for any term not exceeding two years" and a fine. And even of those forgeries that are statutory felonies the most common require an intent not merely to deceive but to defraud: as in the case of forging valuable securities or documents of title to land or to goods, or of forging deeds, wills, or bank-notes⁷.

At common law, it was moreover necessary that the indictment should specify the particular person against whom this intention to defraud had been directed. But it is now⁸ sufficient to allege in general terms an intention to defraud—or, where mere deceit makes the forgery criminal, to deceive—without stating in the indictment, or even shewing by the evidence, what particular person was to suffer.

But it is not necessary that the forger should have intended the defrauded person to incur an actual pecuniary

¹ Forgery Act, 1913, s. 3 (2). Felony: fourteen years' penal servitude.

² *Ibid.* s. 3 (1). Felony: penal servitude for life.

³ Twelve months' imprisonment.

⁴ A merely imaginary name would not make it a forgery; nor would mere false news in the contents.

⁵ Hence where a servant lost the receipt given to him for the price of goods bought by him for his master, and therefore forged an accurate copy of it, the forgery was held by Lord Alverstone not to be indictable (Norwich Assizes, Jan. 1908).

⁶ This provision practically supersedes the common-law crime.

⁷ *Ibid.* s. 2 (1). Penal servitude for life. The notes of even private or foreign banks are included; s. 18 (1).

⁸ *Ibid.* s. 17 (2).

detriment. Consequently a man may be fully guilty of having forged an acceptance, although he may from the outset have truly intended to "take it up" before it should fall due, or although the money which he aimed at getting by the forgery was only a sum that was legally due¹ to him. The mere existence, in the prisoner's mind, of this intent to defraud will suffice, though (a) no one was in fact defrauded, and though (b) no particular individual was aimed at in the prisoner's scheme², and even though (c) there did not in fact exist³ any one whom the scheme could have defrauded. Thus if the person, whose signature has been forged as the drawer of a cheque, has ceased to have any account at the particular bank, this will not deprive the forgery of its full criminality. But the fraudulent intent necessary will not exist unless the offender had reasonable grounds for supposing (however wrongly) that some one or other might possibly be defrauded. Thus it will be no forgery for a man, who is himself the sole payee of a bond, to alter it by lessening its amount⁴.

The offence of forgery consists, as we have seen, in "making" the instrument. But the "uttering" of it is also an offence; incurring whatever punishment a forgery of the particular document would have involved, and being a felony or a misdemeanor according as that forgery would be⁵. A person is regarded as "uttering" when he "uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange... tenders in evidence, or puts off" a forgery, knowing it to be forged, and having the same intent (whether to defraud or to deceive) that the law requires, in the case of that particular thing, to constitute the offence of forging it⁶.

The punishments of forgeries, as we have seen, vary very

¹ 14 Cr. App. R. 101. Cf. p. 252 *supra*.

² Forgery Act, 1913, s. 17 (2). *Rex v. Mazagora*, R. and R. 291.

³ That such a person does exist, is *prima facie* evidence of an intent to defraud. "Uttering" is still stronger evidence of it.

⁴ *Blake v. Allen*, Moore 619. Let us add that he loses more than may appear; for the bond thereby becomes wholly void.

⁵ Forgery Act, 1913, s. 6 (1).

⁶ *Ibid.* s. 6 (2).

greatly. All the various forgeries that have by statute been made felonies, have their respective maxima of punishment, ranging from penal servitude for life to penal servitude for seven years; whilst, instead of penal servitude, imprisonment may be imposed for any term not exceeding two years, with or without hard labour¹. But any forgery that is a mere misdemeanor, is punishable only by such imprisonment as just mentioned, and fine, and binding over; or by merely one of these².

The Criminal Justice Act, 1925, s. 36, makes (from June 1, 1926), the forging of a passport—and similarly the knowingly making any untrue statement for the purpose of procuring a passport (whether for the offender himself or for any other person)—a misdemeanor punishable with imprisonment for two years and a fine of £100.

¹ Forgery Act, 1913, s. 12 (1). The offender may, in addition, be bound over to be of good behaviour; s. 12 (2 b).

² *Ibid.* s. 4, s. 12 (2 a, c). There are a few statutory misdemeanors of Forgery which may be prosecuted either by indictment or even summarily at Petty Sessions. In the latter case their maximum punishments are reduced; e.g. forged trademarks, four months' imprisonment or £20 fine; forged telegrams, a £10 fine. See s. 19 (2) of the Forgery Act, 1913.

CHAPTER XVII

OFFENCES AGAINST THE SAFETY OF THE STATE

PASSING from offences committed against Property to the offences against Public Rights, our account of these latter must commence with what the law ranks as the most heinous of all crimes—that of Treason¹—"the atrocious crime of endeavouring to subvert by violence those institutions which have been ordained in order to secure the peace and happiness of society" (Chief Justice Marshall). Its name, derived from the French *trahir* and Latin *tradere*, denotes an act of perfidious "betrayal." The offence might, at common law, be committed either by a breach of the faith due to the King from his subjects (High treason), or even by a breach of that due to one of those subjects from his own inferiors (Petit treason). But a sufficiently grave breach of the latter form of allegiance could only be committed by the actual slaying of the superior; as when a feudal vassal murdered his lord, a priest his bishop, or a wife her husband. Since 1828 (9 Geo. IV. c. 31, s. 2), such homicides have ceased to differ from ordinary murders; so that high treason is now the only kind of treason known to our law.

An indictment for high treason was in mediæval times a most powerful weapon for the Crown to wield against its two great rivals, the church and the baronage. For a "clerk" who was accused of this crime could not claim benefit of clergy²; and if any feudal vassal was convicted of it, his lands passed to the Crown instead of to his immediate lord. Hence the King's judges, attentive to their master's interests, expanded the definition of high treason until it became a most comprehensive offence, including any kind of injury to

¹ See Pollock and Maitland, I. 498; Stephen, *Hist. Cr. Law*, II. 241.

² *Infra*, p. 486. Pollock and Maitland, I. 429; II. 500.

the King's rights, *e.g.* even the hunting of deer in his forests. At last a reaction was provoked. In the reign of Edward III. one John Gerbage of Royston laid hands on one William of Bottisford and would not release him until he made a payment of £90. This act of unlawful imprisonment was construed as an act of treason, on the plea of its being an "accroaching" (*i.e.* appropriating of) royal power. At this the barons forthwith took action¹; and succeeded in confining the law of treason within definite limits by the enactment, in 1351, of the Statute of Treasons (25 Edw. III. c. 2). This measure is remarkable; both for the constitutional securities directly conferred by it², and also from its affording, at so early a date, what is still almost³ the only instance in which any statutory definition of an important crime has entirely superseded the common law with regard to it. It limited high treason to seven possible forms (two of which have since been reduced to felonies). The seven were:

1. Compassing⁴ the death of the King, of his Queen, or of their eldest son and heir.

So far as these words go, the crime seems to consist in a mere state of mind. But an *actus reus* is made necessary by words in a subsequent part of the statute, which require the person accused to "be thereof proveably attainted of *open deed*⁵." It was for this incipient offence of "compassing the death" of the King, that the regicides of Charles the First

¹ Reeves' *History of English Law* (ed. Finlason), II. 317.

² "No people enjoy a free constitution unless adequate security is furnished by their laws against the discretion of judges in a matter so closely connected [as the law of treason is] with the relation between the Government and its subjects"; Hallam's *Constitutional History*, ch. xv. pp. 203-226 (a passage deserving careful study).

³ Cf. p. 163 *supra*, as to Arson.

⁴ See Austin's *Jurisprudence*, Lect. XXI.

⁵ These words do not occur in the statute until the conclusion of the fourth species of treason. But the judges, in construing the statute, did not limit them to that species; and ruled that, in indictments for any form of treason, a definite overt act must be alleged. The first species, it being the only one which is purely mental, is the case in which this rule assumes its chief importance. See Foster's *Crown Law*, p. 220; and 1 Hale P. C. 108.

were indicted; the ultimate act of taking off his head being merely treated as one of the open deeds which made manifest that compassing¹.

That in treason, just as in all other crimes, a *mens rea* will not constitute guilt without an *actus reus*, is vividly shewn by a Transatlantic decision that an American citizen who meant to join the hostile British forces, but found that he had by mistake attached himself to a party of the United States troops, could not be convicted of treason².

An "open deed," or "overt act," has been defined by Alderson, B., as "any act, measure, course, or means whatever, done, taken, used, or assented to, for the purpose of effecting a traitorous intention³"; and, more tersely, by Lord Tenterden⁴ as "any act manifesting the criminal intention and tending towards the accomplishment of the criminal object." Thus even so commonplace an event as hiring a boat at a riverside wharf may amount to such an act⁵. And the collecting of information for the use of the King's enemies, though it never be actually sent to them, clearly amounts to one⁶. And even a conspiracy, though going no further than the oral conversation, constitutes a sufficient overt act⁷. But mere spoken words, however seditious and violent, are not as a general rule an overt act⁸. Yet they may become one if they are not simply "loose words, spoken without relation to any act or project," but help to carry forward, or are connected with conduct which carries forward, the intention which they express⁹. Thus words inciting some one to kill the King are an overt act of high treason. Indeed spoken words, uttered with an intent to confirm men in the prosecution of measures for a deposing of the King by force of arms, "are

¹ 5 St. Tr. 982.

² *Commonwealth v. Malin*, 1 Dallas 33.

³ 6 St. Tr. (N. S.) 1133.

⁴ *Rex v. Thistlewood*, 33 St. Tr. 684.

⁵ *Lord Preston's Case*, 12 St. Tr. 646 (K. S. C. 377).

⁶ *Rex v. Delamotte*, 22 St. Tr. 808.

⁷ See 7 St. Tr. (N. S.) 463. A conspiracy to depose the King is held to be an overt act of compassing his death.

⁸ *Foster* 200; *Pyne's Case*, Cro. Car. 117 (K. S. C. 377).

⁹ *Rex v. Charnock*, 2 Salk. 633 (K. S. C. 379).

in their very nature and essence the clearest and most absolute overt acts of high treason¹."

But the publication of *written* words, since they are in a more permanent form, and have usually been composed with more deliberation than mere spoken ones, may be a sufficient overt act of treason; even when it is unconnected with any plan for further conduct of a treasonable character. Yet, whilst published writing may clearly be thus an overt act, it is quite uncertain how far, if at all, the mere writing of a document, without ever publishing it, can be an overt act. In 1615, Edward Peacham² was convicted of treason on account of certain passages in a sermon found in his study, which had never been preached. But he was never executed; and died in prison. Algernon Sidney³, again, was similarly convicted of treason in 1683, on account of an old unpublished ms. treatise on Sovereignty found in his house. He was executed; but his conviction was subsequently reversed by Parliament. Hence neither of these two cases is of weight as a precedent. Had Sidney's papers been, on the other hand, plainly referable to some definite project of insurrection, they might of course have constituted an overt act.

2. Violating the King's consort, their eldest daughter unmarried, or the wife of their eldest son and heir.

It seems illogical to bring in the daughter, since the wives of younger sons are omitted; hence all reference to her was left out in the Draft Criminal Code of Lord Beaconsfield's administration (*infra*, p. 531).

A sufficient "violating" may take place even by consent. And the executions, in Henry VIII.'s reign, of two queens, Anne Boleyn and Catherine Howard, serve to shew that the royal lady, who consents to her paramour's addresses, shares the full guilt of his treason.

¹ *Per* Lord Ellenborough in *Rex v. Despard*, 28 St. Tr. at p. 487.

² 2 St. Tr. 869. Hallam, *Const. Hist.* ch. vi.

³ 9 St. Tr. 818; Foster, 198. See also *Lord Preston's Case*, 12 St. Tr. 646 (K. S. C. 377).

3. Levyng war against the King in his realm.

"War," here, is not limited to the true "war" of international law¹; but will include any forcible disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a "general" character, *e.g.* to release the prisoners in *all* the gaols. It is not essential that the offenders should be in military array or be armed with military weapons². It is quite sufficient if there be assembled a large body of men who intend to debar the Government from the free exercise of its lawful powers and are ready to resist with violence any opposition³.

This kind of treason is therefore distinguishable from a mere riot by nothing but the "generality" of the object which is aimed at by those taking part in it. Thus the Edinburgh rioters in the Porteous case of 1736⁴, rendered familiar to English readers by Scott's *Heart of Midlothian*, were, after mature consideration, prosecuted only for riot, and not for treason; inasmuch as, though they sought to interfere with the Crown's prerogative of mercy, they resisted merely its being exercised in the particular case of the detested Captain Porteous, and not the general exercise of it. "It is neither the numbers concerned, nor the force employed, but the object which the people have in view, that determines the character of their crime; which will be a riot or a treason, according as this object is of a private and local or of a public and general character⁵." Thus in *Damaree's Case*⁶, in Queen Anne's reign, a riotous tumult with the object of demolishing all accessible Nonconformist meeting-houses was held to amount to a treason; on the ground that it was to be regarded

¹ Dr T. J. Lawrence's *Principles of International Law*, Part III. ch. I.

² *Reg. v. Dowling*, 7 St. Tr. (N. S.) 460; cf. 32 St. Tr. 3.

³ Nor need the body be large; three men *with dynamite* have been held sufficient. C. C. C. Sess; Pap. xcvi. 280.

⁴ 17 St. Tr. 993; Lord Stanhope's *History of England*, ch. xvii.

⁵ *Rex v. Hardie*, 1 St. Tr. (N. S.) 624. Cf. *Reg. v. Frost*, 4 St. Tr. (N. S.) 85 (K. S. C. 374).

⁶ Foster 213; 15 St. Tr. 521 (K. S. C. 370).

as a public resistance to the Toleration Act (which had legalised such meetings) and an attempt to render it ineffectual by numbers and open force. Hence, although the rioters were strong partisans of the Queen and imagined themselves to be serving her interests and advancing her policy, they were, by construction of law, guilty of treason against her.

It will be noticed that the levying of war must be "in the realm"; so that enlisting men, even within the realm, to go to the aid of the King's enemies in military operations that are to be carried on abroad, will not be punishable under this section¹. It is, however, punishable under both species 1 and 4.

4. Adhering to the King's enemies in his realm², by giving to them aid and comfort³ in the realm or elsewhere⁴.

"Enemies," here (unlike "war" in section 8), is to be taken in the strict sense which international law puts upon the word; and accordingly includes none but true public belligerents⁵. Hence to assist mere rebels against the King, or pirates, does not constitute any offence under this section; though if the assistance were rendered within the realm it would be a sufficient "levying of war" under species 3⁶.

5. Slaying the Chancellor or the Treasurer or the King's justices, when in their places doing their offices.

6 and 7. The statute also contained two further sections, which made it treason to counterfeit the King's great seal or his privy seal, or his money; but these offences were reduced to felony by statutes passed in 1832⁷.

¹ "Even the actual enlistment of men to serve against the Government, does not amount to levying of war. To constitute it, there must be an actual *assembling* of men for a treasonable purpose"; 4 Cranch 126.

² These three words seem surplusage; *Rex v. Lynch*, 20 Cox 477. Cf. *Rex v. Casement*, 12 Cr. App. R. at p. 124.

³ *E.g.* by subscribing to their War Loan.

⁴ As to aid rendered under Compulsion, *e.g.* when supplies are requisitioned by an occupying enemy's army, see p. 74 *supra*.

⁵ Oppenheim's *International Law*, II. ss. 55-57.

⁶ In *Natal* it was held in 1901 that by serving the Boer forces even as a cook, a man gave them "aid and comfort."

⁷ 2 and 3 Wm. IV. c. 123; 2 Wm. IV. c. 34, s. 1.

By statutes of Anne, which are still in force, two further species of treason have been created, viz.:

(a) To attempt to hinder the succession to the Crown of the person entitled thereto under the Act of Settlement¹;

(b) To maintain in writing the invalidity of the line of succession to the Crown established by the Act of Settlement².

To this summary of the statute law of treason, we must add an account of what is almost equally important—the extraordinary extension of its scope by the interpretations which the judges of the seventeenth and eighteenth centuries (from political sagacity rather than from logical necessity), placed upon the simple language of the ancient Parliament of Edward III.

The original idea of high treason was, as we have seen, that of a breach of the personal loyalty due to the lord paramount of the realm from each of his vassals. Thus an alien, who had never been even resident in our realm, could not commit treason; for clearly he was under no duty of allegiance. Hence when a charge of adultery was made, in Parliament, against the Queen of George IV., it was pointed out that it did not amount, as in the case of Henry VIII.'s wives, to a charge of participation in treason. For the acts alleged against Queen Caroline were supposed to have been committed abroad with a paramour (Signor Bergami) who was an alien and had never resided in British territory.

And this rule still remains in force. No alien falls within the law of treason unless, by coming into this realm under the King's permission (express or tacit), and so obtaining the benefit of the King's protection, he has placed himself under the consequent obligation of rendering him an allegiance, though only a local and a temporary one³. And even then,

¹ 1 Anne, st. 2, c. 21, s. 3.

² 6 Anne, c. 41, s. 1.

³ 1 Bl. Comm. 457; Foster 183; *Rex v. Maclane*, 26 St. Tr. 721. This temporary allegiance by domicile, insisted on in many South African trials, seems to be due (Forsyth's *Cases and Opinions*, p. 200) from every subject of a friendly State who enters our dominions, even though he avowedly

as his duty—unlike the lifelong obligation of the King's own subjects—is only temporary, it has sometimes been urged that it does not necessarily continue throughout the whole of his residence, but only for so long as the King's protection continues to be actually effective. Hence, when British territory, where a Boer had for ten years resided, passed into the military occupation of his own State's forces, and he thereupon took service with them, it was argued that the withdrawal of the British troops had dissolved his British allegiance and that his subsequent conduct was therefore no treason against the King. But the Judicial Committee¹ overruled this contention; pointing out that, so soon as the invaders were expelled, the King's courts gave redress for any wrongs sustained during the hostile occupation, and that the King's protection was therefore a continuous one. It would be intolerable if, immediately upon an enemy's taking possession of a country, the aliens resident within it could join him with impunity; a small invading force might thus become an army.

The historical development of our nation tended steadily, century after century, to make a consciousness of the importance of the stability of public order—rather than the feudal feeling of mere personal loyalty to a prince—become the binding force of the body-politic. This new conception of civic duty rendered necessary new provisions for its legal enforcement. The criminal law had to begin to take cognizance of politicians who, whilst devoted to the reigning King, were nevertheless disturbing the order of the realm²; though possibly only by assailing those institutions whereby the constitution had set a check upon the King's powers. It

come for hostile purposes alone. See *Rex v. Lynch*, L. R. [1903] 1 K. B. 444, for the converse case, that of the Englishman naturalised in a hostile State; his naturalisation, if effected during the war, would be, in itself, a treasonable "adherence."

¹ *De Jager v. Att. Gen. of Natal*, L. R. [1907] A. C. 326.

² "There are no crimes which produce vaster or more enduring suffering than those which sap the great pillars of Order" (W. E. H. Lecky).

is a remarkable instance of the activity of judicial legislation that the important legal development, thus rendered necessary, was effected not by Parliament, but by the judges. They transformed the feudal conception of treason, as a breach of personal faith, into the modern one, which regards it as "armed resistance, made on political grounds, to the public order of the realm¹." This new idea they evolved out of Edward III.'s statute by violent interpretations of the language of the 1st and 3rd sections. Thus a compassing of the death of the King was held to be sufficiently evidenced by the overt act of imprisoning him; because, as Machiavelli had observed, "between the prisons and the graves of princes the distance is very small²." And an attempt to raise a rebellion against the King's power, in even a remote colony, was similarly held to shew a compassing of his death; though he were thousands of miles away from the scene of all the disturbances³. So, again, the overt act of inciting foreigners to invade the kingdom, *i.e.* of compassing the levying of war, an offence which the statute does not mention, was held to constitute an overt act towards compassing the King's death⁴. Similarly, as we have seen, a levying of war against any general class of the King's subjects was held—by a construction which Hallam⁵ pronounces to be "repugnant to the understandings of mankind in general and of most lawyers"—to be a levying of war against the King himself; as in the case of riots for the purpose of pulling down all public houses or all inclosures of commons, or of forcing all the employers in a particular trade to raise the rate of wages⁶. Yet men may be breakers of the King's peace without being enemies to the King's government.

These interpretations were often violently artificial, almost setting the statute of Edward aside by their forced con-

¹ Stephen's *General View*, 1st ed. p. 36.

² Foster, 196.

³ *Rex v. Maclane*, 26 St. Tr. 721.

⁴ But if their nation be at peace with us, it is not an adhering "to the King's enemies."

⁵ *Constitutional History*, ch. xv.

⁶ Foster 211.

structions, and accordingly they were viewed with jealousy by the public at large—a jealousy which found expression in the verdicts of jurymen¹. Thus when, for his share in the No-Popery riots of 1780, Lord George Gordon was indicted for the treason of constructively “levying war²,” the acquittal which he secured, whilst fully justified by the facts of the case, was facilitated by the popular dislike to strained interpretations of the law³. Not long afterwards, Hardy, Horne Tooke and Thelwall were in 1794 indicted for a constructive compassing of the King’s death⁴. The doctrine which was laid down at these trials, as to constructive treasons, was of an extreme character, carrying its “construction” of Edward III.’s statute to (in Hallam’s opinion) “a length at which we lose sight of the plain meaning of words⁵.” The verdicts of acquittal shewed that such judicial legislation would serve only to defeat its own end. Direct legislation had obviously become necessary. Accordingly the Parliament at once enacted, in 1795, a statute expressly recognising as treason the most important of the constructive treasons.

After the Irish agitation of 1848, a further statute⁶, extending to Ireland, was passed; which reduced those constructive treasons dealt with in George III.’s statute (except some which really affected the person of the Sovereign) to mere felonies, so far as regarded the operation of the Act of 1795. They have no statutory name; but are commonly known as “treasonable felonies” or “treason-felonies.” They include all deliberate expression, by overt act, of any intention to depose the King, or to incite an invasion of the realm, or to levy war against even a House of Parliament to change its policy. The maximum punishment for them is

¹ An excellent account of Constructive Treason will be found in chapters CLXXVI. and CLXXX. of Lord Campbell’s *Lives of the Chancellors*.

² 21 St. Tr. 485.

³ Campbell’s *Lives of the Chief Justices*, ch. xxxviii.

⁴ 24 St. Tr. 199; 25 St. Tr. 1.

⁵ *Constitutional History*, ch. xv.

⁶ 11 Vict. c. 12, ss. 6, 7. See 54 and 55 Vict. c. 67, abrogating the merely oral treason-felonies.

penal servitude for life. This change in the punishment rendered it much easier to prosecute these crimes with success¹. For juries, naturally, are extremely reluctant to convict persons of good character for offences which, however gravely injurious to the community, may involve no ethical guilt and yet are punished with death.

But it is important to notice that these Acts of 1795 and 1848 left untouched the statute of Edward III. and the judicial constructions of it; and that, consequently, it is still open to the Crown in such cases to proceed against the offender for a constructive treason instead of on the lighter charge of a treason-felony. That precisely the same action should thus occupy, simultaneously, two different grades in the scale of crime is indeed a singular juridical anomaly.

As treason was, of all crimes, that in which the Crown had the strongest direct interest in securing the conviction of an accused person, it was the one in which a public prosecutor or a subservient judge had most temptation to conduct the trial so as to press harshly upon the prisoner. The reigns of the Stuarts afforded so many instances of this harshness that, after the Revolution of 1688, the legislature introduced great innovations into the course of criminal procedure so far as trials for treason were concerned; and, as Erskine says, "met the headlong violence of angry Power by covering the accused all over with the armour of the Law." By the 7 and 8 Wm. III. c. 8 it was provided that a prisoner accused of high treason should have a right to receive (1) a list of the intended jurors², (2) a copy of the indictment, and to make defence (3) by counsel learned in the law, and (4) by witnesses. Another clause (re-enacting and strengthening an enactment of Edward VI.³) made necessary (5) a technical minimum of proof; by providing that the prisoner should not be convicted

¹ So, too, did a change as to Evidence; *infra*, p. 392.

² To which 7 Anne, c. 21, s. 14 adds a list of the intended Crown witnesses.

³ 1 Edw. VI. c. 12, s. 22. Hence when a treason had been committed, but the Crown could obtain only a single witness, the only mode of punishing the offender was either to prosecute him for the mere misdemeanor of

unless either he voluntarily confessed in open court or his guilt were established by *two* witnesses, deposing either to the same overt act, or at least to separate overt acts of the same kind of treason. And (6) it was provided that treason can only be prosecuted within three years from its commission; unless it be committed abroad, or consist of an actual plot to assassinate the Sovereign (not a mere technical "compassing the death"). (These rules—except Nos. (3) and (4)—have not been extended to treason-felony; an omission which creates additional causes for the greater facility of obtaining a conviction for that crime than for treason.)

Treason, like all felonies, was punished with death. But the execution of a traitor was accompanied with special circumstances of horror, to mark the supreme heinousness of his crime¹. Instead of being taken in a cart to the scaffold, he was drawn to it on a hurdle², hanged only partially, cut down alive³ and then disembowelled, beheaded and quartered. The head and quarters were permanently exposed in some conspicuous place⁴, after being boiled in salt to prevent putrefaction, and in cummin seed to prevent birds pecking at them. But the form of sentence in treason was not quite invariable⁵, and the King often remitted everything excepting the beheading. In later times, even where there was no such remission, the executioner usually took it upon himself to

sedition—as in the case of Hampden, who took part in the Rye House Plot (9 St. Tr. 1053), a grandson of the great opponent of illegal taxation—or to attain him by an *ex post facto* Act of Parliament, as in the case of Fenwick (13 St. Tr. 537), who plotted the assassination of William III.

¹ See Stephen, *Hist. Cr. Law*, I. 476–477; Pollock and Maitland, I. 499.

² He was so drawn; and *then* hanged. Avoid the popular sequence "hanged, drawn and quartered"; which suggests that "drawn" is here used in the culinary sense of disembowelling. The traitor was dragged prostrate to the scaffold, originally with nothing under him (as in the picture of A.D. 1242 in the library of C. C. Coll. Camb.). But in later years a hurdle was allowed.

³ The regicide Harrison rose and struck the executioner *after* his bowels had been cut out (5 St. Tr. 1237).

⁴ Dr Pusey's mother, who survived until 1858, could remember seeing on Temple Bar the head of one of the rebels of 1745.

⁵ The grossest may be seen in 3 Hargrave's State Trials, 340, 409.

make the strangulation fatal (technically an act of murder, p. 102). At last it was enacted, in 1814¹, that the beheading and quartering should not take place till after the prisoner had been put to death by the hanging. (Women were never beheaded or quartered; but² burned.) And finally in 1870 by the Forfeitures Act³ all the exceptional features of execution for treason were abolished, except in cases where quartering or beheading may be ordered by royal warrant. For by the Act of 1814⁴ the Crown has still power to order, by warrant under the sign manual, that any male who has been sentenced to be hanged for treason shall be beheaded. The judge, however, cannot appoint any mode of death⁵ but hanging. In treason (as in all capital crimes except murder), the common-law rule which permits executions to take place in public still holds.

A penalty which was entailed at common law by all capital crimes, and which sometimes was more dreaded than that of death, was the loss of all the offender's property, and the consequent ruin of the fortunes of his family. But in treasons his landed estate was not disposed of in the same way as in felonies. For in cases of treason, as we have already seen, not only the personal but also the real estate was forfeited to the Crown absolutely. But in case of felonies, the realty was forfeited to the Crown for no longer than the offender's life and a year afterwards; after which period his estate (if in fee simple and not of gavelkind tenure) escheated at common law to the lord from whom it was held.

There had been no trial, in England or Wales, for a treason since 1882 (or for a treason-felony since 1885), until Lynch⁶ was tried for treason on Jan. 21, 1903.

¹ 54 Geo. III. c. 146.

² Till 1790; 30 Geo. III. c. 48. Here again, in later years, by a merciful illegality, a fatal hanging usually preceded the burning.

³ 33 and 34 Vict. c. 23.

⁴ 54 Geo. III. c. 146, s. 2.

⁵ As to infants under sixteen, see p. 489 n³. All sentences on even adult traitors after 1820 were commuted till Casement's in 1916.

⁶ L. R. [1903] 2 K. B. 444.

MISPRISION OF TREASON

In our account of the law of Principal and Accessory¹ we saw that, when a treason has been committed, anyone who knowingly receives or assists the traitor, so as to aid him in escaping from justice, becomes himself guilty of complicity in the past act of treason as a "principal after the fact." And, in the case of felonies, a corresponding rule renders a similar harbourer an "accessory after the fact" to the original felony. We may now add that, even where no active assistance is thus given to the person who has committed a treason or a felony, anyone who knows of his guilt, and can give information that might lead to his arrest, will commit an offence if he omits to communicate that information to some justice of the peace. The "misprision" (*i.e.* high misdemeanor) of thus concealing a treason, or a felony, is usually termed briefly "misprision of treason" or "misprision of felony²." There is some authority³ for saying that a misprision may also be committed in the case of a treason or felony that is merely being planned, if anyone who knows of the design refrains (however much he may disapprove of the project) from disclosing it to a justice of the peace in order to prevent its accomplishment⁴. If he go so far as to give actual assent and encouragement to the plot, he may of course become guilty (not of this mere misdemeanor but) as an accomplice in the felony or treason itself, should the design be ultimately carried into effect. A misprision of felony is punishable with imprisonment and fine⁵; but a misprision of treason

¹ *Supra*, pp. 84, 89.

² The word Misprision was formerly in use as a general name for any of the more heinous kinds of misdemeanors (4 Bl. Comm. 119); but it has become obsolete except in the two offences now mentioned; where it probably means "undervaluing" the crime concealed. In French "*mépriser*."

³ 2 Hawkins P. C. c. 29, s. 23; cf. Bishop's *Criminal Law of U.S.A.*

⁴ For the wider duty imposed in India, including even that of answering questions put by the police, see the Indian Penal Code, s. 44.

⁵ Prosecutions for it are now unknown, but Lord Wensleydale had tried two; *The Times*, March 18, 1852. In 1914 a prosecution for it was commenced in County Clare; but was abandoned on the six defendants agreeing to give evidence against the murderer.

with imprisonment for life and the forfeiture of the offender's goods absolutely and of his lands for so long as he lives. In the case of mere misdemeanors¹ there is no similar crime in omitting to disclose them.

It is moreover in felonies, and perhaps also even in misdemeanors² an offence to "compound" them; *i.e.* to bargain, *for value*, to abstain from prosecuting the offender who has committed a crime³. You commit this offence if you promise a thief not to prosecute him if only he will return the goods he stole from you; but you may lawfully take them back if you make no such promise. You may shew mercy, but must not sell mercy. This offence of compounding is committed by the bare act of agreement; even though the compounder afterwards breaks his agreement and prosecutes the criminal. And inasmuch as the law permits not merely the person injured by a crime, but also all other members of the community, to prosecute, it is criminal for anyone to make such a composition; even though he suffered no injury and indeed has no concern with the crime.

PRAEMUNIRE

Akin in nature to treason, though far less heinous in degree, are the miscellaneous offences which have become grouped together under the name of Praemunire. Under this head are comprised a variety of crimes whose chief connexion lies in their having the same punishment. But all the earlier offences so punished were, as some of the later also are, acts tending to introduce into the realm some foreign power (usually that of the Pope), to the diminution of the King's authority. The word "praemunire" was the name of the writ which commenced the proceedings against a person

¹ Cf. p. 89.

² Often, certainly, as a "conspiracy to pervert the course of justice." But as to it in "quasi-private" crimes, see Anson on Contracts, II. vii. s. 1. The numerous authorities on the whole question are collected in Archbold's invaluable *Criminal Pleading and Evidence*, pp. 1208-1211.

³ But you *may* so bargain for not taking divorce proceedings, as they are civil. Cf. p. 12 n. *supra*.

guilty of such an offence; but afterwards it was also applied to any statute that created an offence for which this writ was to be issued; and, still later, it came to be applied to the punishment appointed for such offences, and even to the offences themselves¹.

Voluminous as are the collections of our State Trials, they contain only one English instance of any proceedings under any Statute of Praemunire; viz. that of some Quakers who refused to swear allegiance to Charles II.² The principal offences of praemunire still recognised in our criminal law are the following:

(1) By 25 Henry VIII. c. 20, the refusal of a dean and chapter to elect to a bishopric the clergyman nominated to them by the King.

(2) By the Habeas Corpus Act (31 Car. II. c. 2), the unlawful sending of any prisoner outside the realm, so that he would be beyond the protection of the writ of Habeas Corpus.

This offence is not only made a praemunire, but, as we have seen, even the Crown's power to pardon it is taken away³.

(3) By 6 Anne, c. 23, s. 9, if the Scotch peers when met to elect their representative peers to the House of Lords discharge any further business they commit a praemunire.

The offence of praemunire is only a misdemeanor; yet it is punished more severely than most felonies⁴. For the offender (a) is placed out of the King's protection, e.g. he cannot sue; (b) he is imprisoned for life; and (c) he forfeits to the Crown all his property, real as well as personal, absolutely. This forfeiture is pronounced expressly as a part of the sentence. Consequently it does not render the offence a felony⁵, and it is not removed by the Forfeitures Act, 1870.

¹ 4 Bl. Comm. ch. viii.

² 6 St. Tr. 201. There is also one Irish case, 2 St. Tr. 553.

³ *Supra*, p. 15

⁴ Cf. p. 97 *supra*.

⁵ *Supra*, p. 92.

OFFENCES AGAINST THE PUBLIC PEACE

In reviewing the law of treason, we have seen¹ that the extension of that crime by judicial constructions has enlarged its scope so as to include many acts which would seem to fall more naturally under the head of the much less heinous offence of Rioting. This offence itself is also one of a very wide and elastic character. This comprehensiveness is probably due (like the severity of the law of Conspiracy²) to the weakness which characterised our constitutional provisions for the prevention of crime throughout the long period that elapsed, after the decay of the old system of corporate responsibility by Frankpledge³, before the establishment by Sir Robert Peel of our modern force of borough and county police. Throughout these intervening centuries, the law felt its parish constabulary to be comparatively powerless to prevent any offence that involved the presence of a plurality of offenders. It consequently attempted to supply the defect by very comprehensive prohibitions of all such crimes.

Hence it was laid down that whenever so many as three persons meet together to support each other, even against opposition, in carrying out a purpose which is likely to involve violence or to produce in the minds of their neighbours any reasonable apprehensions of violence, then even though they ultimately depart without doing anything whatever towards carrying out their design, the mere fact of their having thus met will constitute a crime. It will be the indictable misdemeanor of Unlawful Assembly. Such an offence will therefore be committed as soon as three labourers collect in a cottage, with a view to a night's poaching, or to attending service in the village church and protesting turbulently against the mode in which it is conducted; even though they never actually start on their expedition. Similarly, a group of people who have come together to see a prize-fight constitute an unlawful assembly, even though the fight never

¹ *Supra*, p. 273.

² *Infra*, p. 293.

³ *Supra*, p. 29.

takes place¹. The offence is sometimes defined so widely as to include all cases where three or more persons are assembled for any unlawful purpose whatever, even though it be one that can cause no fears of violence. But this comprehensive definition, long ago called in question², has now been set aside by the case of *Field v. The Receiver for the Metropolitan Police District*, L. R. [1907] 2 K. B. 853 (which should also be studied for its definition of the offence of Riot). Accordingly, when three boys meet to go and gamble at pitch-and-toss on a common, or when three costermongers go into a street on Sunday morning to sell their vegetables contrary to the Lord's Day Act, they do not constitute an unlawful assembly (though they may be guilty of an indictable conspiracy³).

In this offence, as in all others, the law regards persons as responsible for the natural consequences of their conduct. Consequently if people have assembled together under such circumstances as are in fact likely to cause alarm to bystanders of ordinary courage, the assembly will be an unlawful one, even though the original purpose for which it came together involved neither violence nor any other illegality. "You must look not only to the purpose for which they meet, but also to the manner in which they come, and to the means which they are using" (Bayley, J.). Accordingly the idea of an unlawful assembly is not restricted to gatherings met together for the commission of some crime (like the poachers or prize-fighters already mentioned), or for arousing seditious feelings, or for inciting to some breach of the law (such as the non-payment of rents). For however innocent⁴

¹ *Rex v. Brodribb*, 6 C. and P. 571; cf. *Reg. v. Coney*, L. R. 8 Q. B. D. 534.

² *Dig. Cr. Law*, Art. 75. Cf. *Beatty v. Gillbanks*, L. R. 9 Q. B. D. 308 (K. S. C. 392).

³ *Infra*, p. 290.

⁴ The seriousness of possible risks was well illustrated in 1908 when the Battersea Borough Council were told by the Commissioner of Police that they must either remove the "Battersea Brown Dog" with its provocative anti-vivisectionist inscription or pay £700 a year for special police protection.

may be the object for which a meeting is convened—*e.g.* to support some Parliamentary measure by strictly constitutional means—it will nevertheless become an unlawful assembly if the persons who take part in it act in such a way as to give firm and rational men a reasonable ground for fearing that some breach of the peace will be committed¹. Mere numbers alone, it is true, will not suffice to make an assembly unlawful; but they are a circumstance to be considered. And a marked absence of women and children from a crowd, an unusually late hour of meeting, a seditious tone in the speeches, any menacing cries or banners, any carrying of weapons, are similarly circumstances which must be taken into account in determining whether a meeting might reasonably inspire terror in a neighbourhood. But it is important to notice that, if persons meet together for a lawful purpose and quite peaceably² in act and intent, the fact of their being aware that other people, less scrupulous, are likely to disturb them unlawfully and thereby to create a breach of the peace, does not render their assembly an unlawful one. A man cannot be convicted for doing a lawful act, *merely* because his doing it may cause some one else to do an unlawful act³. But to do this intrinsically lawful act, *e.g.* to wear a party badge (17 Ir. C. L. 1), with the desire of thereby irritating others into a breach of the peace, would render it unlawful. Some authorities go further, and hold that mere knowledge (without desire) of the irritation being probable will suffice to render the act unlawful if it be done without reasonable occasion; (cf. 17 Cox 483, and the Draft Code of 1879).

The alarm with which the common law viewed unlawful

¹ *Reg. v. Vincent*, 9 C. and P. 91 (K. S. C. 391). *E.g.* if speeches provocative of violence are made.

² As to the necessity of this qualification, see *Wise v. Dunning*, L. R. [1902] 1 K. B. 167; Dicey's *Law of the Constitution*, App. v.; and 14 L. R. Ir. 111.

³ *Beatty v. Gillbanks*, L. R. 9 Q. B. D. 308 (K. S. C. 392); cf. 51 L. T. 304, and *McClenaghan v. Waters* (*The Times*, July 18, 1882). Yet it seems clear in (at any rate) Irish law, that constables are justified in removing such innocent persons to a safer place, if it be the only means of avoiding an imminent breach of the peace; *Coyne v. Tweedy*, Ir. [1898] 2. 167.

assemblies naturally led to the establishment of the rule that they may be dispersed forcibly, even by private persons acting on their own initiative¹. The particular degree of force which such persons will be lawfully justified in using must be determined by the particular necessities of each individual case. But an unlawful assembly—even when accompanied by such further circumstances as aggravate it into a common-law riot—only amounts to a misdemeanor; and therefore, although blows with fists or with sticks may be struck when necessary to suppress it, it will be unlawful to kill any of the rioters or to employ deadly weapons. If, however, the rioters go beyond their mere misdemeanor and proceed to the length of some felonious violence, then even the infliction of death will be permissible in resisting such violence or in dispersing or arresting the rioters, and the act of killing will be a justifiable homicide². Indeed, so long as those engaged in suppressing the felonious violence act with due care, the accidental killing of even an innocent bystander by the means lawfully employed for the suppression will amount only to a case of homicide by misadventure.

Closely akin to the offence of an unlawful assembly are some other crimes of tumultuous disorder which are technically distinguished from it. Thus an unlawful assembly develops into a *Rout*, so soon as the assembled persons do any act towards carrying out the illegal purpose which has made their assembly unlawful; *e.g.* so soon as they actually commence their journey towards the plantation which is to be netted or the field where the fight is to come off. And the rout will become a *Riot*, so soon as this illegal purpose is put into effect forcibly by men mutually intending to resist any opposition³; *e.g.* so soon as a hare is netted or a blow is

¹ When an anti-scientific crowd, on Dec. 2, 1833, attacked the Anatomical School at Cambridge the undergraduates aided in its defence.

² "The law of England is unswervingly Socialistic. The individual rioter must be shot down rather than be allowed to interfere with the good of the community" (Lord Haldane).

³ *Field v. The Receiver*, L. R. [1907] 2 K. B. 853; cf. 6 Cr. App. R. 60.

struck. All these three offences are misdemeanors punishable with the common-law penalties of fine and imprisonment; to which, by statute, hard labour may now be added¹.

But from these mere misdemeanors we must pass to a cognate but more modern and more heinous offence; which has no recognised technical name but, for distinction's sake, may conveniently be termed a Riotous Assembly. It is the creation of the Riot Act of 1715², which was passed in consequence of the riots in many towns that followed the accession of George I. in 1714. It establishes a wiser mode of prosecuting grave tumults than by treating them as treasonable "levyings of war³." Under its provisions, whenever an unlawful assembly of *twelve* or more persons do not disperse within an hour after a Justice of the Peace has read, or has endeavoured to read, to them a proclamation (set out in the Act) calling upon them to disperse, they cease to be mere misdemeanants and become guilty of a felony, punishable with penal servitude for life. But, by a departure from the general rule of criminal procedure (see p. 416 *infra*), no prosecution for this felony can be commenced after the lapse of twelve months from its commission.

The Riot Act contains an express clause⁴ indemnifying any persons who, after the expiration of the statutory hour, may have to use violence for dispersing or arresting the rioters and in so doing may hurt or kill some one. Indeed, such an indemnity was already implied in the provision that, after the lapse of the hour, the rioters' offence should become aggravated into a felony⁵; for this rendered justifiable the employment of any amount of force necessary to suppress this tumultuous felony, *e.g.* even the infliction of death, as by troops firing upon the crowd. But even whilst the hour

¹ 4 and 5 Geo. V. c. 58, s. 16.

² 1 Geo. I. st. 2, c. 5. This statute contains (s. 7) the remarkable provision that its contents must be "openly read at every quarter sessions and at every court leet"; a provision disobeyed probably everywhere except at the annual court leet of Southwark.

³ *Supra*, p. 270.

⁴ s. 3.

⁵ *Supra*, pp. 95, 103.

is still unexpired the common-law right of dispersion¹ still exists, unaffected by the Riot Act and by the justice's proclamation. Consequently a moderate degree of force may be lawfully used even then. And if the rioters should proceed to commit any felonious violence, they may be checked with the same extreme measures of force as if the statutory hour were over. But a misapprehension that the Riot Act had somehow impliedly modified the common-law right did at one time prevail, and sometimes led to grave disorder being allowed to rage unchecked. In 1780, for instance, in consequence of this misapprehension, London was abandoned to pillage for three days during the disturbances initiated by Lord George Gordon². Neither the citizens nor the soldiers dared to fire upon the plundering incendiaries who had become masters of the metropolis, because no magistrate was present to "read the Riot Act." Their timidity was doubtless enhanced by the verdict of murder which had been given at Edinburgh in 1736 against Captain Porteous³, and by the indictments which had been found in 1768 against the soldiers who fired upon the Wilkite rioters in London⁴. But the result of the Gordon riots was to make it clear, beyond doubt, that every citizen—and the armed soldier, no less than any other—has by common law the right and the duty of using even deadly violence, whenever it is indispensable for the purpose of protecting person and property against a felonious mob of rioters. For, in Lord Mansfield's phrase, "whether the citizen's coat be a brown one or a red" it is equally his duty to aid the law⁵. This principle is vividly

¹ *Supra*, p. 285.

² See Dickens' *Barnaby Rudge*, chs. LXIII.—LXVII. Cf. the Dublin riots of 1913 in which 196 policemen were injured.

³ *Supra*, p. 270.

⁴ Of those Wilkites, a certain stout-hearted Mr Green, with the help of his equally courageous maidservant, slew no fewer than eighteen, when they attacked the little alehouse which he kept. He was tried for murder, and acquitted; but seven of his antagonists were hanged (Knight's *Popular History of England*, vi. 291).

⁵ During the Littleport riots of 1816 the heads of the Cambridge colleges passed a resolution "to arm the undergraduates if necessary."

recognised in the present Army Regulations; which (whilst providing that, if a magistrate be present, the officer in command of the troops should not fire without the magistrate's orders)¹ direct that if no magistrate be present, the officer need not wait for one before taking active steps to prevent outrage upon persons or property².

The matter, indeed, is not merely one of right, but of duty. It is an indictable misdemeanor for any person to refuse to take part in suppressing a riot, when called upon to do so by a justice of the peace or by a constable. And the duty of the justice of the peace himself goes further. It is incumbent on him to proceed to the scene of a riot, and to read the statutory proclamation if the riot be such as to require it, and to take whatever subsequent steps are necessary to disperse the rioters³. If he fail to do this, he is guilty of a criminal neglect of duty, unless he can shew that he has at least done all that a man of firm and constant mind would have done under the circumstances. In the vast majority of cases the mere arrival of troops suffices to quell the disturbance⁴.

¹ And even those orders will not absolve the officer from the duty of exercising his own discretion before proceeding to fire.

² An admirable account of the law as to the suppression of riots will be found in the Report (drafted by Lord Bowen) upon the Featherstone Riots of 1893; when 2000 miners, about to destroy a colliery, were faced by twenty-eight soldiers; see *The Times* of December 8, 1893. Cf. the Report of the Royal Commission of 1914 on the landing of arms at Howth.

³ *Rex v. Kennett*, 5 C. and P. 283 (K. S. C. 396).

⁴ The law of Riot includes a remarkable instance of a Vicarious liability—that thrown upon the inhabitants of any locality where rioters (even mere misdemeanants) have done damage to “buildings,” to make good that damage. The particular locality originally assigned as the unit for this purpose was the Hundred. It is now the district—whether a borough or a section of a county—which maintains the local police-force; and the liability is discharged out of the local police-rate. See the Riot Damages Act, 1886 (49 and 50 Vict. c. 38). It protects not only the building but also the premises appurtenant to it; and the property within.

CHAPTER XVIII

CONSPIRACY

CONSPIRACY is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it. This definition presents three points for notice: (1) the act of agreement, (2) the persons agreeing, (3) the purpose agreed upon.

(1) *The Agreement.* It must not be supposed that conspiracy is a purely mental crime, consisting in the mere concurrence of the intentions of the parties. Here as everywhere in our law, bare intention is no crime. "Agreement," as Lord Chelmsford puts it clearly, "is an act in advancement of the intention which each person has conceived in his mind¹." It is not mere intention, but the announcement and acceptance of intentions. Bodily movement, by word or gesture, is consequently indispensable to effect it. In order of time, this precedes the act agreed upon. But the mere fact of the parties having come to such an arrangement suffices to constitute a conspiracy². Hence it is not necessary to shew that they went on to commit some overt act towards carrying it out, though this (and also some consequent Damage) would be necessary in an action of Tort for conspiracy³. It follows that a person may be convicted of a conspiracy as soon as it has been formed, and before any overt act has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for effecting it. Thus if two lovers agree to commit suicide together, but promptly think better of it, they nevertheless

¹ *Mulcahy v. The Queen*, L. R. 3 H. L. at p. 328.

² *Rex v. Gill*, 2 B. and Ald. 205 (K. S. C. 398).

³ *Mogul Steamship Co. v. McGregor*, L. R. 21 Q. B. D., per Lord Coleridge, C.J., at p. 549. See Pollock on Torts, ch. VIII. s. 4.

are liable to an indictment for conspiracy¹. On the other hand, the actual accomplishment of the crime agreed upon will not cause the original offence of conspiracy to become “merged” in it². Hence it would be technically possible to bring an indictment for a mere conspiracy to commit some grave crime, and then support it by evidence that tends to shew an actual consummation of the crime; but judges sternly discourage such a course as unfair to the accused³.

It is not necessary that the intended victims should be persons already ascertained. An indictment may charge a conspiracy to defraud “such persons as might thereafter be induced to deal with” the conspirators.

(2) *Two persons*. The very name of the crime indicates that it is essentially one of combination; a man cannot by himself *con-spire*⁴. Moreover, the law applies here the old doctrine of conjugal unity, reckoning husband and wife as one person; so that an unlawful combination by him and her alone does not amount to a conspiracy. But though there must be a plurality of conspirators, it is not necessary that all should be brought to trial together. One person may be indicted, alone, for conspiring with other persons who are not in custody, or who are even unknown to the indictors. Indeed some of the conspirators may be unknown even to the others, provided they all be acting under the directions of one common leader.

(3) *An unlawful purpose*. The term “unlawful” is here used in a sense which is unique⁵; and, unhappily, has never yet been defined precisely. The purposes which it comprises appear to be of the following species:

(i) Agreements to commit a substantive crime; *e.g.* a

¹ The question has been raised whether there is an indictable conspiracy when one of the parties has no intention to carry it out, and aims merely at getting money from the other under pretence of conspiring.

² As attempts are merged; see p. 82 *infra*.

³ See 19 Cr. App. R. at p. 137.

⁴ So, on indictment of *A* and *B* for conspiring together, if *A* be acquitted, *B* cannot be convicted.

⁵ Contrast its sense in the Vagrancy Act; *infra*, p. 326, n¹.

conspiracy to steal, or even merely to incite some one else to steal. This extends to all cases where it would be criminal for any of the conspirators to commit the act agreed upon; even though there be in the gang other persons in whom it would be no offence to commit it; and to all "crimes," even non-indictable ones¹; *e.g.* non-payment of poor-rates.

(ii) Agreements to commit any tort that is malicious² or fraudulent. Some say that agreements to commit any tort, of whatever kind, are indictable as conspiracies. But the weight of authority³ seems to be in favour of limiting the rule to torts of fraud or malice; thus excluding, for instance, a trespass committed *bonâ fide* by persons eager to assert their supposed right of way.

(iii) Agreements to commit a breach of contract under circumstances that are peculiarly injurious to the public⁴.

(iv) Agreements to do certain other acts, which (unlike all those hitherto mentioned) are not breaches of law at all, but which nevertheless are outrageously immoral or else are, in some way, extremely injurious to the public. We may quote, as instances, agreements to facilitate the seduction of a woman⁵; or to run slackly in a race so as to enable a confederate to win his bets⁶; or to hiss a play unfairly⁷; or to defraud a shipowner by secretly putting stow-aways on board. Similar criminality would arise in agreements to raise by false reports the price of the Funds⁸ or of any other vendible commodity⁹; or so to carry on trade as to diminish

¹ *Reg. v. Whitchurch*, L. R. 24 Q. B. D. 420. Cf. p. 283 *supra*; and Lord Campbell's "If two men agree to blow their noses together during Divine service so as to disturb the congregation, they may be indicted for conspiracy" (Hansard, March 1, 1859).

² *Wright's Conspiracy*, 40; *e.g.* to pirate a copyright book.

³ The conflicting authorities are well collected in Harrison on Conspiracy, pp. 91-96.

⁴ *Vertue v. Lord Clive*, 4 Burrows 2473 (K. S. C. 401).

⁵ *Rex v. Howell*, 4 F. and F. 160.

⁶ *Rex v. Orbell*, 6 Mod. 42.

⁷ *Gregory v. Duke of Brunswick*, 6 Man. and Gr. 205.

⁸ *Rex v. De Berenger*, 3 M. and S. 67 (the trial of Lord Dundonald, the naval hero).

⁹ L. R. 1 Q. B. D. at p. 743; 2 Q. B. D. at p. 59.

the revenue; or to persuade a prosecutor not to appear at the trial; or to give false information to the police; or to indemnify a prisoner's bail¹. On the other hand, it is doubtful whether an agreement to make loud noises for the purpose of disturbing an invalid neighbour would be indictable as a conspiracy². And it is now settled, that there is nothing criminal (or even illegal) in a "knock out," *i.e.* a combination among buyers to abstain from bidding against one another, and to redistribute amongst themselves afterwards the goods so underbought³. And a thrifty combination of poor-law authorities to marry a female pauper to a pauper of another parish, in order to relieve the ratepayers of the woman's parish, is not a conspiracy⁴. Yet some combinations for procurement of marriage will amount to conspiracy; *e.g.* taking a young woman of property from the custody of her relations in order to marry her to one of the conspirators⁵. And although all combinations "in restraint of trade" are so far illegal as to be unenforceable⁶, it is now settled that they do not necessarily constitute a criminal offence. Some, at least, of them did so in the older common law; as, for example, any combination of employed or employers that affected the rate of wages, (such as that of the journeymen tailors* of Cambridge who were successfully indicted in 1721 for combining to refuse to work below a certain rate of payment⁷). But by the Conspiracy and Protection of Property Act, 1875 (38 and 39 Vict. c. 86), no combination for the doing of any act "in furtherance of a Trade Dispute between employers and workmen" is any longer to be indictable, unless the act

¹ *Rex v. Porter*, L. R. [1910] 1 K. B. 369.

² Cf. *Rex v. Lloyd*, 4 Esp. 200, with *Rex v. Levy*, 2 Starkie 458.

³ *Rawlings v. General Trading Co.*, L. R. [1921] 1 K. B. 635. It is even enforceable as a contract. Yet see p. 537 *infra*.

⁴ *Rex v. Seward*, 1 A. and E. 706 (K. S. C. 405). At Meldreth (Cambs.) in 1724 a widow who cost the ratepayers 70s. a year was thus got rid of at an expense of only 50s. 8d.

⁵ *Rex v. Wakefield*, 2 Lewin 1, cf. *Rex v. Thorp*, 5 Mod. 221 (K. S. C. 407).

⁶ *Mogul Steamship Co. v. McGregor*, L. R. [1892] A. C. 25.

⁷ 8 Mod. 11 (K. S. C. 404); cf. *Rex v. Hammond*, 2 Esp. 718 (K. S. C. 411).

contemplated be one which is in itself a crime—and moreover a crime punishable with imprisonment—even when committed by one person alone¹.

The vagueness of the definition of this fourth class of “unlawful” purposes—to say nothing of the minor uncertainties hanging over the second and third classes—is historically intelligible. For in days when our police system was ineffective, the law felt itself dangerously threatened by any concert amongst evil-doers; and consequently, in the seven, tenth and eighteenth centuries, indictments against conspirators were held good very readily. “A conspiracy,” said even Lord Holt, “is odious in the law².” But this vagueness renders it possible for judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes, by declaring this purpose to be “unlawful.” Owing to this elasticity in the definition of the crime, and also to the unusually wide range of evidence by which (as we shall see) indictments for it may be supported, there is much justification for the language used by Fitzgerald, J., in reference to it, in the Irish State Trials of 1867: “The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits.” For, in the prudent words of the greatest of American judges: “It is more safe that punishment should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they are to operate, than that it should be inflicted under the influence of those passions which a trial seldom fails to excite, and which a flexible definition of the crime, or a construction that would render it flexible, might bring into operation³.”

As to the Evidence admissible, the principles are just the same for conspiracy as for other crimes. But, owing to two

¹ Cf. as to civil actions for Torts, the Trade Disputes Act, 1906.

² 5 Mod. 408. ³ *Per* Marshall, C.J., in *Ex parte Bollman* (4 Cranch 127).

peculiarities in the circumstances to which those principles are here applied, it often seems as if there were an unusual laxity in the modes of giving proof of an accusation of conspiracy¹. For (a) it rarely happens that the actual fact of the conspiring can be proved by direct evidence; since such agreements are usually entered into both swiftly and secretly. Hence they ordinarily can be proved only by a mere inference from the subsequent conduct of the parties, in committing some overt acts which tend so obviously towards the alleged unlawful result as to suggest that they must have arisen from an agreement to bring it about². Upon each of several isolated doings a conjectural interpretation is put; and from the aggregate of these interpretations an inference is drawn. The circumstantial evidence thus rendered necessary will often embrace a very wide range of acts, committed at widely different times and in widely different places³. The range of admissible evidence is still further widened (b) by the fact that each of the parties has, by entering into the agreement, adopted all his confederates as agents to assist him in carrying it out. Consequently, by the general doctrine as to principal and agent, any act done⁴ subsequently for that purpose⁵ by any of them will be admissible as evidence against him⁶; unless, before it was done, he had given them notice that he *withdrew* from the conspiracy. Just the same doctrine is, of

¹ See *Reg. v. Hunt*, 1 St. Tr. (N. S.) 437; cf. 7 St. Tr. (N. S.) 472-475.

² *Reg. v. Parnell*, 14 Cox 505 (K. S. C. 412), *Rex v. Parsons*, 1 W. Bl. 391 (K. S. C. 408). For acts *not* obvious enough, see 3 Cr. App. R. 31, 32.

³ *Rex v. Hammond*, 2 Esp. 718 (K. S. C. 411).

⁴ But not a mere *admission* uttered; see below, p. 405. The cobbler is the burglar's agent for mending the noiseless shoes, but not for uttering a remark as to the use they have been put to; (though he can, of course, give evidence as to such a remark having been made by the burglar).

⁵ But not acts that go beyond that purpose; e.g. where the purpose was only theft, yet murder was committed. Nor acts done after the purpose has been accomplished; e.g. the disposal of his share of the proceeds of the theft.

⁶ Hence in trials for conspiracy a difficulty is apt to arise in determining at what stage the judge will pronounce the evidence to have given sufficient *prima facie* proof of a conspiracy, and of the defendant's being a party in it, to render it now permissible to give against him evidence of the conduct of his colleagues (furthering it) when he was *absent* from them.

course, applicable to any crime where a plurality of offenders are concerned, and so is not peculiar to trials for conspiracy. But in them it assumes unusual prominence; because, in cases of conspiracy, an unusually long interval often elapses—with consequently an unusually long series of acts—between the time when the common criminal purpose is formed and the time when it is carried out or is frustrated by arrest.

Moreover there is often, just as on every other protracted trial of a plurality of defendants, the danger that the jury may—even despite judicial warning—be influenced against one of the accused by evidence that is legally admissible only against another of them. Thirteen days were occupied at Birmingham in 1925 by the trial of a group of nineteen men for a conspiracy to defraud. To prevent any misapplication of evidence by the jury, the judge found it desirable to sum up against each prisoner separately, and took the verdict upon him before passing to the next man's case.

Conspiracy is a misdemeanor; punishable with fine and imprisonment, to which no limit is affixed. Since the Criminal Justice Administration Act, 1914 (see p. 318 *infra*), hard labour may, in all cases, be added. Moreover a conspiracy to murder is punishable with penal servitude for ten years, though it still remains only a misdemeanor (24 and 25 Vict. c. 100, s. 4).

CHAPTER XIX

PERJURY

IN Anglo-Saxon legal procedure, judicial oaths played a very important part, being taken both by jurors and by compurgators. Both these classes were punishable for any perjuries they uttered. But the functions of the modern witness had not yet been differentiated from those of the juror; and perjury by witnesses was consequently an unknown crime¹. And when, in the fourteenth century, witnesses did begin to be brought in to inform the jury, perjury by them was not made a punishable offence. Hence it became a maxim that the law regarded every witness's oath as true. Even the ecclesiastical courts, though treating breaches of faith in general as matters within their jurisdiction, took no notice of the grave breach of faith involved in giving false witness. But, before the end of the fifteenth century, the Star Chamber sometimes interposed to punish perjuries. And, in the sixteenth century, Parliament itself began to interfere with the immunity of witnesses; dealing in 1540² with subornation of perjury, and in 1562³ with perjury itself. But for each of these offences it imposed only a pecuniary penalty, recoverable civilly by a penal action. Finally, however, the Star Chamber, in 1613, declared perjury by a witness to be punishable at common law⁴. Sir James Stephen emphatically characterises this decision as "one of the boldest, and, it must be added, one of the most reasonable, acts of judicial legislation on record⁵."

The offence thus created was one which could only be committed in a judicial proceeding⁶, and by a witness who

¹ See Pollock and Maitland, II. 539; Stephen, *Hist. Cr. Law*, III. 240.

² 32 Hen. VIII. c. 9, s. 3.

³ 5 Eliz. c. 9.

⁴ *Rex v. Rowland*, 3 Coke Inst. 164 (K. S. C. 415).

⁵ *Dig. Cr. Law*, 1st ed. p. 345.

⁶ *The Keepers of the Liberties v. Gwinn*, Style 336 (K. S. C. 416).

gave false evidence on oath. But the law gradually came to assume a far more complicated form. Parliament specified various matters which were not judicial proceedings, yet in which the telling a falsehood upon oath was to be a Perjury. Again, some classes of witnesses came to be allowed by statute to give evidence in judicial proceedings on mere affirmation, without any oath; and falsehood by them, though no Perjury, was made as severely punishable as if it were one. Moreover, the judges proceeded to declare that, in any matter wherein the law required an oath to be taken, the taking it falsely—if it were not judicial, and so not a Perjury—would be at least a common-law misdemeanor¹, punishable with fine and imprisonment, though not with the penalties of Perjury.

Happily the multifarious rules on these subjects have now been reduced to a comparatively simple and logical form. The noble task of codifying our criminal law, a task attempted by the statesmen of a generation ago² on a comprehensive scale but with no practical result, was resumed in 1910 by Lord Loreburn in a more fragmentary manner but with legislative success. For he carried the Perjury Act, 1911 (1 and 2 Geo. V. c. 6); which modifies not only the common law but also the provisions of upwards of a hundred and thirty Acts of Parliament.

It creates, or continues, numerous offences of False Public Statement. All, however severely punishable, are only misdemeanors. In each of them the offence lies in the breach of the oath or affirmation or declaration; that breach constituting only one single crime, however many be the lies that falsify the evidence. A fresh lie does not create a fresh perjury, but is merely a fresh proof of the one general perjury; or, in technical phrase, “matter for a new *Assignment* of Perjury.” “Assertory” oaths, not “promissory” ones, are concerned.

The Statute classifies the offences into three groups.

(A) The grade most heinous consists of the offences punishable with seven years’ penal servitude, or with two years’

¹ *Reg. v. Foster* (R. and R. 459, K. S. C. 417).

² See p. 531 *infra*.

imprisonment (whether with or without hard labour), or with a fine (whether in addition to one of the preceding punishments or alone). Of these there are several.

(1) "Perjury"; a term which is henceforth to be restricted, as it was originally, to the case of *forensic* false evidence. It is defined—s. 1 (1)—as the crime committed when a person, lawfully "sworn¹" as a witness (or an interpreter) in a *judicial* proceeding wilfully makes a statement, material in that proceeding, which he knows to be false or which he does not believe to be true.

The term "judicial" is, however, employed here in a wide sense which will cover not only inferior courts, like petty sessions, or courts outside the common law, like a court-martial, but even many matters of mere administrative business. For it is—s. 1 (2)—to include all proceedings "before any court, tribunal, or person, having by law the power to hear, receive, and examine evidence on oath²." Yet clearly the offence will not be committed unless the evidence be actually taken before a person who has legal power to take it. Thus when a Registrar in bankruptcy, who was presiding over the examination of a debtor, left the room to discharge other duties but bade the solicitor go on questioning the debtor, false answers given after his leaving were held to be no perjury³. And when justices of the peace held an informal preliminary meeting, at which they took evidence, in order to lighten the labour of their statutory licensing-session, a

¹ The expression is here not limited to religious Oaths, but includes also the taking of a legal Affirmation or Declaration—s. 15 (2). But the *child* who gives evidence without being sworn (*infra*, pp. 383, 393) still remains punishable for its falsity only by being sent for a month to a mere "place of detention."

² Difficulties as to the common-law "territoriality" of criminal jurisdiction (*infra*, p. 416) the Act obviates by treating as perjuries punishable in this country not only—s. 1 (4)—such as are committed here for the purposes of a judicial proceeding in colonial or foreign territory, but also—s. 1 (5)—all that are committed for the purposes of an English judicial proceeding, though committed in other parts of the King's dominions or (if before a British functionary) even in some foreign country.

³ *Reg. v. Lloyd*, L. R. 19 Q. B. D. 215.

witness who swore falsely at this unauthorised meeting was held to have committed no offence¹.

(2) Similar conduct when committed, outside all judicial proceedings, by a person who has been "required or authorised by law to make any statement on 'oath' [including, by s. 15, Affirmation or Declaration] for any purpose"; s. 2 (1).

In these two crimes—A (1) and A (2)—in which, whether in a judicial or a non-judicial proceeding, the offender has been "sworn," it is not necessary that his statement should be false at all. The man becomes punishable simply through uttering an assertion, false or true, which he does not positively "believe to be true"; s. 1 (1), s. 2 (1). For a man who tells the truth quite unintentionally is morally a liar. Bracton (fo. 289) enforces this principle by the grotesque illustration of a Jewish juryman who, by concurring in a verdict that Christ was born of a virgin, committed a perjury, whilst his Christian colleagues of course committed none². Conversely, false swearing is no crime when it is not wilful, but merely inadvertent (see p. 302).

On the other hand, a rule of peculiar, and perhaps unfortunate³, leniency is borrowed by the Act, from the older law, for these two important offences—A (1) and A (2)—and also for one—viz. B—of those that are less heinous. For in these three crimes no guilt is incurred by a wilful false statement unless it be "material⁴" to the proceeding, or the purpose, for which it was made. This lenient old rule has often enabled witnesses, who had wilfully given false evidence, to escape all punishment. Fortunately the judges construe the rule very narrowly. Thus they have held that the evidence need not be material to the actual issue of the litigation—a lie about his solvency by a man who merely offers himself as

¹ *Rex v. Shaw*, 6 Cr. App. R. 103.

² Falsity as to a mental fact suffices; e.g. the witness's belief, or his "I cannot remember"; *Reg. v. Schlesinger*, 10 Q. B. 470.

³ The Indian and Canadian Penal Codes shew no such leniency.

⁴ I.e. such as might actually affect the mind of the tribunal. Materiality as to the sentence suffices; *Rex v. Wheeler*, 24 Cox 603.

bail is sufficiently material to a criminal prosecution. Again, evidence may be sufficiently "material" even though it were material, not intrinsically, but only by its facilitating the jury's acceptance of other testimony which had an intrinsic materiality¹. Thus mere trivial details, mentioned by a witness in giving his account of a transaction, may become important by their leading the jury to believe that his knowledge of the transaction is complete, and his evidence therefore likely to be accurate. On the same ground, all statements made by a witness as to matters that merely affect his credibility are material², *e.g.* his denial of having been convicted of a crime. And even if the false evidence were legally inadmissible, yet this need not prevent its being regarded as "material" enough to form the subject of an indictment for perjury. There is, for instance, a rule that when a witness answers questions that relate merely to his own credibility³, his answers are to be taken as final; so that no other witness can legally be brought to contradict them. Yet if, by a breach of this rule, some second witness be permitted to give this contradiction, and he give it falsely, he may be indicted for perjury; for, so soon as the contradiction was admitted, it did affect the credit given to the previous witness, and so became "material⁴."

The long-disputed question whether it is for the judge or for the jury to say if a statement was or was not "material," is determined by the Act in favour of the judge; s. 1 (6).

(3) The wilful use of a false affidavit for the purposes of the Bills of Sale Act, 1878⁵; s. 2 (2).

Moreover this first grade of crimes includes the following

¹ "A witness's statements as to his Identity—his name, abode, position in life—are material. For they affect the degree of trust which the jury will give him." *Per Darling, J.*, at C. C. C., Jan. 12, 1923.

² *Reg. v. Baker*, L. R. [1895] 1 Q. B. 797 (K. S. C. 419).

³ *Infra*, p. 365.

⁴ *Reg. v. Gibbon*, L. and C. 109.

⁵ 41 and 42 Vict. c. 31. See Williams' *Personal Property*, Pt. I. ch. II.

two offences which may be committed even when no formal oath or affirmation has been taken¹.

(4) False statements, whether they be "sworn" to or not, made with reference to effecting the celebration or registration of a marriage; s. 3 (1).

(5) False statements, sworn to or not, with reference to the registration² of a birth or of a death; s. 4 (1).

(B) A less guilty group of offences consists of some that are not punishable with penal servitude but only with two years' imprisonment, or a fine, or both (s. 5).

In these no Oath has been taken. They are committed when statements, wilfully false in a *material* particular, are made in a "Statutory Declaration³"; or in some document which the offender was authorised to make, or some oral declaration which he was required to make, by a public general Act of Parliament⁴.

(C) The least heinous grade is that of the offences for which the punishment is imprisonment for a year (with, since 1914, hard labour) with or without a fine, or a fine alone. These offences arise when a man makes (either in writing or orally) a representation "which he knows to be false or fraudulent" for the purpose of getting himself registered, or of procuring a certificate of some one's being registered, on the statutory roll of persons legally qualified to practice a particular calling—*e.g.* medicine or dentistry; s. 6⁵.

¹ The Criminal Justice Act, 1925 (s. 28), will allow in *both* these two offences—(4) and (5)—the alternative of trial at Petty Sessions; but in that case the utmost punishment for either would be a fine of £50.

² On indictment for this offence a fine cannot be inflicted along with penal servitude or imprisonment, but only in substitution for them.

³ See the Statutory Declarations Act, 1835 (5 and 6 Wm. IV. c. 62). The Criminal Justice Act, 1925, s. 24 and sched. 2, will allow the alternative of trial at Petty Sessions; with a possible punishment of, at most, six months' imprisonment and £100 fine.

⁴ As when a voter is questioned by the returning officer at a general election.

⁵ The Act is so comprehensively framed that perhaps no form of Public Statement is omitted. But what of false statements given orally, and not on oath, by a witness at a Local Government public inquiry?

In all these various offences, from Perjury downwards, wilfulness is an element essential to guilt. The man who makes an untrue assertion, but with an honest belief that it is true, commits no crime. His clerk made out the account, or his solicitor prepared the affidavit; and then he, on reading it over, felt no doubt of its correctness. Though due to inadvertence or forgetfulness or mistake—even careless and stupid mistake—his untrue words were not due to wilfulness. The case would be different if, instead of an actual belief that his assertion was true, he had had no belief either way¹; for, by making the assertion, he pledged himself that his mind was not a blank with regard to it, so he lied “wilfully.” It may however be doubted whether such non-belief would support a conviction for those offences—A (4) and B and C—which the Act requires to be committed not only wilfully but *knowingly*.

If any one incites a person to commit either perjury or any other offence against the Act, he commits, of course (*supra*, p. 80), a misdemeanor for which he may be fined and imprisoned with (since 1914) hard labour. But if his incitement prove so successful that the other man does commit the offence, there is then an actual Subornation; and for this the suborner may be visited with as severe a punishment as for the perjury, or other offence, itself (s. 7).

For all the above-mentioned offences a time-honoured precaution, which the common law of Evidence imposed in prosecutions for perjury, is perpetuated. “A person shall not be liable to be convicted of *any offence* against this Act (or of any offence declared by any other Act to be, or to be punishable as, perjury or subornation of perjury) solely upon the evidence of one witness as to the falsity of any statement alleged to be false”; s. 18. Otherwise there would but be one man’s oath against another’s—the statement originally sworn to by the defendant, and, on the other hand, the

¹ See L. R. 9 A. C. at p. 203.

contradiction of it now sworn to by the witness for the prosecution. (See *infra*, p. 392.) But it is sufficient if this one direct witness be corroborated by some admission which the prisoner has made, or by circumstantial evidence¹.

The Divorce Court is commonly regarded as "the playground of Perjury"; and not merely because a perverted sense of honour frequently prompts adulterers to falsehood. But the crime is still more common in the collision cases of the Admiralty Court; where sailors often manifest a clannish zeal for their ship. The Commercial Court is probably the tribunal most free from mendacity.

¹ Cf. *Rex v. Saldanha* (*The Times* of Nov. 1st, 1921, C. C. A.).

CHAPTER XX

BIGAMY

BIGAMY, as Blackstone tells us, properly signifies being married *twice*; but in law is used as synonymous with polygamy, or having a plurality of wives at once. (In 1790 a man named Miller was pilloried for having married so many as thirty women, for the sake of getting their money.) It originally was a purely ecclesiastical offence. But in 1603, by 1 Jac. I. c. 11, it was made felony. This statute, after being repealed and re-enacted by 9 George IV. c. 31, is now reproduced in the Offences against the Person Act, 1861 (24 and 25 Vict. c. 100, s. 57).

The offence is committed when a person who

- (1) has previously been married,
- (2) and has not since been legally divorced,
- (3) goes through a legally recognised ceremony of marriage with another person,
- (4) whilst the original wife or husband is still living;
- (5) unless the original wife or husband has been continuously absent from the accused husband or wife during the seven years preceding the second marriage; and has not during that time been known by him or her to be living.

1. *Previously married*¹. To sustain an indictment for bigamy the first marriage² must have been valid according to the law of the domicile of the parties, so far as concerns their personal capacity to marry³; and according to the law of the place of celebration, so far as concerns the ceremonial form.

¹ As to the proof of this, see pp. 331, 332 *infra*.

² A "marriage" under polygamous (*e.g.* Moslem) law does not suffice; L. R. [1917] 1 K. B. at p. 360. Cf. *Seedat v. The Master*, South African L. R. [1917] 302; and see 29 New Zealand Rep. 371.

³ Dicey's *Conflict of Laws*, 3rd ed. p. 678. But see p. 865 as to the growing tendency to test Capacity by the same rule as Form.

Amongst possible causes of voidness may be mentioned the fact of either party being an idiot at the time of marriage; or the fact of the parties being within the prohibited degrees of relationship (as upon a man's marriage with his niece). So too, if the prisoner's first wife were actually the wife of someone else, at the time of her marriage with him, this marriage would necessarily be void. Consequently for him to proceed to marry some other woman will, though apparently a bigamy, be really no crime¹. Similarly if *X* marries first *A*, and secondly *B*, and then thirdly, after *A*'s death, marries *C*, this marriage between *X* and *C* will not be indictable as a bigamy; inasmuch as the marriage with *B* was a mere nullity.

But besides those invalid marriages which are actually void (*i.e.* which may be treated as null by any court where evidence is given of the circumstances that invalidate them), there are others which are only voidable, *i.e.* the cause of their invalidity is merely one for which a court of matrimonial jurisdiction may set aside the marriage, if called upon to do so, whilst both the parties are still alive. But, until thus set aside, such a marriage must be treated by all courts as valid. Hence even a voidable marriage, as where either party to the marriage is then under the age of capacity (fourteen and twelve respectively², or is sexually impotent), has always been regarded as sufficient to fix the wife's Nationality and Domicil, and to render any second marriage bigamous.

2. *Not divorced.* It will be a good defence to a charge of bigamy, if the prisoner prove that the first marriage had been validly dissolved³ (or judicially declared to have always been void), before the celebration of the second marriage. The divorce must be a legal one; legal, that is, by the law of the

¹ Lord Euston in 1871 married *A*. Afterwards, on finding that *B*, whom she had married in 1863, was still alive, he sued for nullity of marriage. But her successful defence was that in 1863 *B* was already married to *C*, who lived till 1867.

² Halsbury, xvi. 281; Com. Dig. *tit.* Baron, B. 5; 2 P. Wms. 561; Dyer 369.

³ A "decree nisi" is *not* enough; a point too often overlooked.

country where the divorced parties were domiciled at the time¹. If it were not thus valid², the fact that, by an error of law, they honestly though mistakenly supposed it to be valid, will not prevent the second marriage of either of them from being criminal. But if valid under that country's law, a divorce will be effectual here as a defence to a charge of bigamy, even though the ground on which it was granted was one that would not have enabled the parties to obtain a divorce in this country, had they then been domiciled here.

3. *Legally recognised ceremony.* Bigamy, like homicide, forms one of the rare exceptions to the principle that criminal jurisdiction is purely territorial. For, if the person accused be a British subject, it is immaterial in what territory (even though it be outside the British dominions altogether³) the second marriage took place; and he may be tried in any part of the United Kingdom where he may be in custody. But a person who is not a subject of His Majesty cannot thus be tried here for a bigamy committed outside the United Kingdom.

The second marriage (the alleged crime) must have been in a form recognised by the law of the place where it was celebrated⁴. But any form, legally recognised there, is sufficient. It is enough that it would have been good on some occasions; notwithstanding its being one which could not have been effectual on that particular occasion, even had the guilty person not been already married. Thus it is no defence for a man, accused of bigamy, to shew that he is a Christian, and that the form of marriage which he went through at his

¹ *Le Mesurier v. Le Mesurier*, L. R. [1895] A. C. 517. It may be convenient to note here that by the Administration of Justice Act, 1920, s. 15, questions of even a *foreign* law must now be decided by the judge himself, instead of being, as formerly, submitted, as questions of Fact, to the jury.

² Moslem divorces do not suffice in England; L. R. [1917] 1 K. B. 634.

³ *Earl Russell's Case*, L. R. [1901] A. C. 446. Cf. p. 143 *supra*.

⁴ *Reg. v. Allen*, L. R. 1 C. C. R. 367 (K. S. C. 423). In India, if the first marriage be under monogamous law, a second marriage even under a polygamous law will be a criminal bigamy; *The Emperor v. Lazar*, 30 Madras 551.

second wedding was one that is valid for Jews alone. Nor is it any defence to shew that the parties were too near akin to be able to contract a valid marriage. For the ground upon which bigamy is punished is the broad one of its involving an outrage upon public decency by the profanation of a solemn ceremony.

4. *Original spouse still living.* The prosecution must establish the fact that the prisoner's original husband or wife was still living at the time of the second marriage. Still it is not necessary that this should be shewn by the direct evidence of some one who can speak to having seen that person alive at that date. It may be sufficiently established by mere probable inference from circumstances; *e.g.* from the fact that the prisoner's first wife was alive and well a few days before his second marriage. But the fact of her having been alive merely within the often-cited period of "seven years" before that marriage, will frequently be utterly insufficient to justify an inference that she was still alive when it was solemnised. For the effect of shewing that she was alive at some time within these seven years is merely to neutralise the presumption¹ of her death, not to reverse it and so throw back the burden of proof upon the prisoner. It simply releases the jury from any technical presumption; and sets them free to look to the circumstances of the particular case. From the woman's age and health, the climate of the country in which she resided, the period which has elapsed since she was heard of, and similar circumstances, they must draw an inference as to whether she did or did not survive until the time when her husband married again.

5. *Not absent for seven years.* It is provided by the statute² that it shall be a conclusive defence to shew that the prisoner's original spouse (1) had been continuously absent from the prisoner (even though by his wilful desertion), during the seven years preceding the second marriage, and (2) had never

¹ *Infra*, pp. 331, 333.

² 24 and 25 Vict. c. 100, s. 57; cf. 1 Jac. I. c. 11, s. 2.

been heard of by the prisoner meanwhile. It is not necessary that the prisoner should give express proof of both the elements requisite to this defence. For if his wife's continuous absence for seven years be proved, this will suffice to raise a *primâ facie* presumption of her not having been heard of throughout that period¹. But of course the prosecution may rebut this presumption, by shewing that within the seven years the fact of her being alive had become known to the prisoner.

We now come to a difficulty about which there have been keen controversies. If it be shewn (1) that the prisoner's wife was alive at the time of his second marriage, and (2) that at some time during the seven years preceding the second marriage he had known of her being still alive, must he necessarily be convicted? What if, subsequently to his last hearing of her as alive, he had received authoritative², though mistaken, assurance that she was dead? So far as the mere language of the statute goes, he undoubtedly has satisfied its definition of bigamy. Yet he may have done nothing which he did not honestly believe, and reasonably believe, to be perfectly lawful. For a long time judges differed in their decisions as to whether such a belief would or would not be a good defence for the re-marrying. But in 1889 it was decided in the Court for Crown Cases Reserved, by nine judges to five, that the general principle of criminal law, that a person cannot be guilty of a crime unless he has a guilty mind, is so fundamental that it must here override the omission of the statute in not expressly including a mental element as an essential requisite in the offence of bigamy. Accordingly the majority of the court held that the prisoner's *bonâ fide* belief, on reasonable grounds, that his wife was dead, would excuse his

¹ *Reg. v. Curgerwen*, L. R. 1 C. C. R. 1 (K. S. C. 426).

² He must not act upon mere rumour but must make searching inquiries, proportionate to the seriousness of such an act as marriage. "My husband was a sailor; and a sailor—whom I did not know and have never since seen—told me in Hull that he died in Chatham hospital" was held insufficient by Pickford, J.

re-marrying even within the seven years¹. In the United States the opposite view prevails. And in England it is now settled² (despite earlier rulings to the contrary) that no such excuse is afforded by a similar mistaken belief, at the time of the later marriage, that the former marriage had been to a *married* person, and was therefore void; or, similarly, that this former marriage had been dissolved by a Divorce.

As regards the evidence which will be available at the trial, it should be noted that, although the husbands or wives of accused persons were excluded by the common law from giving evidence at the trial of the accusation, Parliament has greatly relaxed this exclusion. The Criminal Evidence Act, 1898³, now admits the husband or wife to give evidence *for* a prisoner; and, if the accusation be one of Bigamy, the husband or wife may, by the Criminal Justice Administration Act, 1914⁴, also be called even for the prosecution, and without the consent of the person accused.

Bigamy is a felony, punishable with penal servitude for not more than seven years or less than three, or with imprisonment (with or without hard labour) for not more than two years⁵. It is, like manslaughter, a peculiarly "elastic" crime⁶; the degrees of guilt varying—according to the degree of deceit practised and the sex of the person wronged—from an offence closely approximating in heinousness to a rape⁷, down to cases in which the parties' only guilt consists in

¹ *Reg. v. Tolson*, L. R. 23 Q. B. D. 168 (K. S. C. 15). On the other hand, his merely *conjectural* (though correct) belief of her being alive will not make it a crime for him to re-marry after seven years' absence; for the Act requires Knowledge.

² *Rex v. Wheat*, 15 Cr. App. R. 134; L. R. [1921] 2 K. B. 119.

³ *Infra*, p. 411.

⁴ *Infra*, p. 412.

⁵ Lord Russell, L.C.J., added "and the having two mothers-in-law."

⁶ During the one year 1920 the sentences inflicted for it by one very experienced judge ranged from four years' penal servitude down to a single day's imprisonment.

⁷ Hence when the guilty party is the man, the judge, before passing sentence, usually inquires from the "wife" whether sexual intercourse had taken place between them before the "marriage." If it had *not*, his guilt is much greater.

their having misused a legal ceremonial for the purpose of giving a decent appearance to intercourse which they knew to be illicit. Indeed there may even be cases of an undoubtedly criminal bigamy where there is no moral guilt at all. For both parties may have been misled by some very natural misapprehension of law. The great, and unhappily increasing, dissimilarity between the matrimonial laws of civilised nations has made it but too easy for a man and woman to be husband and wife in one country and yet not so in another.

The other party to the bigamous marriage, if aware, at the time, of its criminal character, became guilty of aiding and abetting the crime; and accordingly may be indicted for bigamy as a principal in the second degree. On the other hand, when a woman, who reasonably believes her husband to be dead, marries a man who knows (but conceals) the fact of his being still alive, this man will escape all punishment; for the woman committed no crime, so he cannot be treated as an accessory¹.

It may be added that where a bigamy is committed, but the other party to the second marriage has no knowledge of its invalidity, she or he may, after the criminal proceedings, bring a civil action to recover damages for the tort of Deceit, which the prisoner committed in pretending to be free to marry².

¹ *Draft Criminal Code for Jamaica*, p. 112.

² *Chitty's General Practice*, p. xviii. Cf. p. 96 *supra*.

CHAPTER XXI

LIBEL

A LIBEL¹ is such a writing or picture as either defames an individual ("private" libel) or injures religion, government² or morals ("public" libel).

We have already seen³ that most crimes are also torts. But the most conspicuous illustration of this is afforded by the defamatory, or private, Libel. It is a crime which not only is a tort, but is constantly treated as such in actual practice. For (1) it is only a misdemeanor, and accordingly not affected by the rule which delayed, and therefore usually frustrated, civil proceedings for crimes that were of the degree of felonies. And again, (2) it is a crime which, unlike most others, is often committed by persons whose pecuniary means are large enough to enable them to pay whatever compensation a civil court may award. Hence libels are much more frequently followed up by civil than by criminal proceedings. And the judges of the present day desire to see *indictments* for defamation restricted to those cases in which the libel is sufficiently aggravated, either by its intrinsic gravity or by its obstinate repetition, as to be likely to provoke its victim to commit a breach of the peace⁴.

Hence a detailed exposition of the general principles of the law of libel should be sought rather in books on Torts⁵ than in those devoted to criminal law. It may, therefore, be sufficient for the purposes of the present volume if we indicate

¹ The *Oxford Dictionary* states that the original meaning, "a little book" (*libellus*), had been narrowed to the present meaning of an unlawful book at least as early as 1631.

² *E.g.* 151 C. C. C. Sess. Pap. 459.

³ *Supra*, p. 20.

⁴ Yet an accusation of mere incompetence in business ("hopeless mismanagement"), with no charge against honesty or honour, was held by the Court of Criminal Appeal to be suitable for indictment (*Rex v. Dawson*, Aug. 19, 1924).

⁵ See Pollock on Torts, ch. vii.; Salmond on Torts, ch. xiv,

very briefly the fundamental principles which are common to both the civil and the criminal law of libel, and then explain the distinguishing features of the latter aspect of this wrong¹. The following principles are common to both its aspects:

(I) Anyone who publishes a defamatory document concerning another person, so as to tend to bring him into hatred², contempt, or ridicule³, is guilty of "publishing a defamatory libel⁴." This "document" may consist of either a written or a pictorial⁵ composition; *e.g.* even of an effigy suspended from a mock gibbet.

(II) The publication need not be "malicious" in the popular sense of that word (*i.e.* it need not be due to spite, or, as it is called, "express malice"), nor even in the statutory one (*supra*, pp. 148, 164) of evil intention. A printer's purely accidental omission of a "not" will suffice. It is true that the Libel Act, 1843, when dealing with criminal libel, does in terms restrict the offence to "malicious publication." But from the mere fact of publishing such matter, without any of the recognised legal grounds of excuse, the law draws an absolute presumption that the publication was malicious. Hence it is now settled⁶ that it is not even necessary for the prosecutor or plaintiff to make in his pleadings any formal allegation that the libel was published maliciously. The law of libel has thus, at last, worked itself free from entanglement with the old fictions of a "constructive malice," which some-

¹ See Stephen, *Hist. Cr. Law*, II. 298-395; Stephen, *Dig. Cr. Law*, Arts. 96, 179-183, 291-303.

² Even merely amongst a narrow circle of associates, *e.g.* a little coterie of anarchists; *Rex v. Malatesta*, 7 Cr. App. R. 273.

³ In one of the United States, it has thus been held libellous to describe a man as "a Tory." With emphatic rhetoric the Supreme Court of Georgia thus ruled the point: "When the name of Washington shall grow cold to the ear of the patriot, when the poles of the earth shall be swung round to a coincidence with the equator, then and not till then will it cease to be a libel" to call a man a Tory; *Giles v. The State*, 6 Cobb 284, A.D. 1849.

⁴ *Reg. v. Munslow*, L. R. [1895] 1 Q. B. 758 (K. S. C. 432).

⁵ *Monson v. Tussauds*, L. R. [1894] 1 Q. B. 671.

⁶ *Reg. v. Munslow*, *supra*.

times (as in the case of ardent social or political reformers) was—in Lord Macaulay's words—"only a technical name for benevolence¹."

(III) The unlawful meaning which the document is alleged to have conveyed must be one:

(i) which it was reasonably capable of conveying to ordinary people of the class addressed², and

(ii) which it actually did convey to the particular person to whom it was published.

(IV) Everyone who circulates, or authorises the circulation of, a libel is *primâ facie* regarded as publishing it. But if he can be shewn to have been a mere unconscious instrument (as, for instance, is generally the case with a newsboy), this will be a sufficient defence³; some mental element being necessary to constitute such an act of "publication" as will render the doer responsible for it.

(V) There are certain occasions upon which the publication of (what would on ordinary occasions be) a libel becomes privileged⁴. Such a privilege may be either:

(a) *Absolute*; e.g. for publication in a House of Parliament⁵, or by its order; and also for publication in a Court of Justice⁶.

(b) *Qualified*; i.e. arising *primâ facie*, but ceasing if the prosecution shew that the publication was made with a spiteful motive, or, in other words, that there was "express" malice on the part of the defendant. A privilege of this qualified character is conceded to matter that is published under a legal or even a social duty; or as a fair comment

¹ *Miscell. Works*, iv. 189.

² *Capital and Counties Bank v. Henty*, L. R. 7 A. C. at p. 776.

³ *Emmens v. Pottle*, L. R. 16 Q. B. D. 354.

⁴ As to libels in conjugal life, see p. 74 *supra*.

⁵ *Rex v. Lord Abingdon*, 1 Esp. 225 (K. S. C. 440).

⁶ *Watson v. Jones*, L. R. [1905] A. C. 480. This covers communications made to a solicitor, or a constable, even when legal proceedings are as yet only in contemplation, by a person who may (or may not) become a witness in the case. See 30 T. L. R. 591. Contrast 30 T. L. R. 596.

upon a subject of public concern¹; or for the protection of any of the interests of the person publishing it (or, probably even of the interests of the person to whom it is published²); and to fair and accurate reports of Parliamentary or judicial proceedings³; and also, by statute⁴, to such fair and accurate reports of public meetings, or of open sittings of public bodies, as are published in a "newspaper" and relate to some matter of public concern.

(VI) It is the function of the judge to decide (i) whether the document is reasonably capable of bearing the alleged defamatory meaning, *e.g.* a banker's note on a cheque "Refer to drawer" is *not* defamatory; (ii) whether the occasion was privileged; and—where there exists a qualified privilege—(iii) whether there is *any* evidence of express malice. All other matters, including now even the fundamental question whether the document is or is not a libel⁵, are left to the jury. For the crime lies not in the document itself but in the act of publishing it; and the guilt or innocence of that act lies in the surrounding circumstances (of which the jury alone are the judges). Red-hot coals, destructive on the floor, may be welcome in the fireplace.

But though the criminal and the civil rules as to cases of libel are, fundamentally, thus similar, they differ as regards some few minor points. These are the following:

(1) No civil action will lie for a libel unless it has been

¹ *Thomas v. Bradbury*, L. R. [1906] 2 K. B. 627. *E.g.* public cricket matches.

² *Coxhead v. Richards*, 2 C. B. 569; *Kenny's Tort Cases*, p. 337.

³ *Usill v. Hales*, L. R. 3 C. P. D. 319 (K. S. C. 442).

⁴ 51 and 52 Vict. c. 64, s. 4. This Act also gives "newspapers" a statutory privilege for their reports of *judicial* proceedings that seems to be an Absolute one (see *Gatley on Libel*, p. 162); though Dr Blake Odgers contended for its being Qualified only.

⁵ See Lord Campbell's *Lives of the Lord Chancellors*, ch. CLXXXVIII., and May's *Constitutional History*, II. 253–263, as to the historic controversy, during 1752–1791, on this important constitutional question, ultimately settled by Mr Fox's Libel Act, 32 Geo. III. c. 60.

published to some *third* person; since the sole object of such an action is to secure to the plaintiff compensation for the wrongful loss of that esteem in which other people formerly held him¹. Hence a defamatory letter sent to the very person defamed will not, in the ordinary course, become actionable; though a defamatory post-card addressed to him will be². But the reason for the criminal prohibition against libels is, on the other hand, their tendency to provoke the libelled person into committing a breach of the peace; and this tendency is naturally greatest when it is directly to himself that the defamation is addressed. Accordingly a publication to the actual person defamed is quite sufficient to support an indictment³.

(2) The *truth* of the matter complained of—even though the jury find it to have been published “maliciously”—has long been a good defence in a civil action for libel. For it “justifies” the words, by shewing that the plaintiff has no right to that reputation which he claims compensation for being deprived of. But the common law did not regard this as being any defence to criminal⁴ proceedings; for the truer the charge, the more likely was it to cause a breach of the peace. An honest man may often despise calumnies; but a rascal is sure to resent exposure. Hence in criminal courts it used even to be a maxim that “the greater the truth, the greater the libel⁵.” But this difference between the civil and criminal rules has been almost wholly removed by Lord Campbell’s Act (6 and 7 Vict. c. 96), which permits the truth—the substantial truth, even with errors of detail—of a

¹ *Barrow v. Llewellyn*, Hobart 62 (K. S. C. 437).

² *Infra*, p. 332 n⁶.

³ *Clutterbuck v. Chaffers*, 1 Starkie 471 (K. S. C. 438). Cf. 4 Bl. Comm. 150. It is often said that when the publication is, thus, only to the person libelled the indictment must expressly allege an intent to cause a breach of the peace. But it would seem that this is not really necessary; for in *Reg. v. Adams* (L. R. 22 Q. B. D. 66) the count contained no such allegation.

⁴ Hobart 253; Moore 627; 5 Coke Rep. 125.

⁵ Journalists are said to add “and the greater the libel, the greater our circulation.”

*private*¹ libel to be a valid defence to criminal proceedings for it. This permission to "justify" the defamation is, however, subject to a proviso that the defendant must further allege expressly, and prove to the satisfaction of the jury, that it was for the public benefit that the matter in question should be made known. The existence of this proviso makes it possible to repress the publication of statements which, though quite true, are objectionable, whether on grounds of decency, or as being disclosures of State secrets, or as being painful yet needless intrusions into the privacy of domestic life. It may be for the public benefit to make it known that a man is suffering from an infectious fever; but not that he is suffering from heart-disease, or from some carefully concealed deformity (like that club-foot, the consciousness of whose existence embittered the whole life of Byron).

(3) There is no civil action for libelling a *class* of persons, if, as must usually be the case, its members are too numerous and unascertainable to join as plaintiffs in a litigation. But since, technically speaking, it is not by the persons injured, but by the King, that criminal proceedings are carried on, an indictment will lie; provided only that the class defamed be not an indefinite (*e.g.* "the men of science," "the Socialists") but a definite one (*e.g.* "the clergy of the diocese of Durham"², "the justices of the peace for the county of Middlesex").

(4) No civil action for a libel upon a person *deceased* has ever been brought by his representatives³; for the dead have no legal rights and can suffer no legal wrongs. But in those extreme cases where the libel, under the guise of attacking the dead man, attacks living ones by bringing his posterity into contempt or hatred, they—like any other class of persons who are injured by a libel—may obtain protection from the

¹ Hence Mylius, who accused the King of bigamy, was prosecuted, not as for a seditious libel, but as for a private one; thus enabling him to plead Truth, and thereby to enable the King to disprove it (*The Times*, Feb. 2, 1911).

² *Rex v. Williams*, 5 B. and Ald. 595. Cf. 2 Swanston 503.

³ *Reg. v. Labouchere*, L. R. 12 Q. B. D. at p. 324.

criminal law¹. Yet to extend that protection to the case of ordinary attacks upon the reputation of persons deceased, would be to impose an intolerable restraint upon the literary freedom of every writer of modern history²; especially as the lapse of time might have rendered it impossible for him to obtain *legal* proof of the truth of his statements, and as that truth, moreover, even if proved, might not be of sufficient public moment to constitute a statutory defence to criminal proceedings. Historical criticism may, no doubt, cause much pain to the descendants of the person criticised; but mere mental suffering never suffices, by itself, to render an act wrongful.

(5) In civil actions, a master is liable for *all* libels published by his servants in the course of their employment. But in criminal cases, it is³ a good defence if he prove that the libel was published neither by his authority nor through his negligence. Cf. p. 45 *supra*.

Besides differing thus in their treatment of libellous writings the two systems also differ in their treatment of the cognate subject of unlawful *oral* utterances⁴. These never create, as a defamatory libel does, a twofold liability, at once civil and criminal. For if the spoken words are merely Slander, *i.e.* if they only defame private persons, a civil action will lie in certain grave cases⁵; but an indictment will not lie⁶ (except in those rare instances where the words tend quite directly

¹ See *Rex v. Topham*, 4 T. R. 130; *Reg. v. Ensor*, 3 T. L. R. 366; *Rex v. Hunt*, 2 St. Tr. (N. S.) 69, for libelling Geo. III. in Geo. IV.'s reign. As to blackmailing by threats to libel the dead, see 6 and 7 Geo. V. c. 50, s. 31.

² See however the careful provision in the Italian Penal Code (Art. 399) to make possible such prosecutions. In 1916, at Tacoma, U.S.A., a man was convicted as a libeller for having written that George Washington was "a slaveholder and an inveterate drinker"; Parmelee's *Criminology*, p. 460.

³ 6 and 7 Vict. c. 96, s. 7.

⁴ If I dictate to my shorthandwriter a defamatory letter, I only publish a Slander. There is no libel, until the words are written down; and no crime until the writing is "published."

⁵ See Pollock on Torts, ch. vii. s. 1.

⁶ But the Indian Penal Code (s. 499) allows criminal proceedings. Yet unwisely; for oral utterances are heard by few, are transient, are often hasty, and are always apt to be misapprehended.

to a breach of the peace¹, as when they convey a challenge to fight). And, conversely, if the oral words are blasphemous², or obscene³, or seditious, or reflect on the administration of justice, an indictment can be brought (as for similar *written* words); but no civil action can.

Libel is a misdemeanor, punishable with fine and imprisonment⁴. In the case of seditious, blasphemous, and other public libels there appears to be no limit to the period of imprisonment⁵; and similar words uttered orally are punishable similarly. But in the case of defamatory libels, the term has been restricted by statute to two years, when the libel was published with a knowledge of its being false; and, in all other cases of defamatory libels, to a single year⁶.

Originally, hard labour could not be imposed in any case of Libel, whether defamatory or public. But for all libels, except seditious ones, it now can be. For the Criminal Justice Administration Act, 1914, provides, s. 16 (1), that any sentence of imprisonment without option of fine may, in the discretion of the court, impose hard labour, "notwithstanding that the offence is an offence at common law, or that the statute under which the sentence is passed does not authorise the imposition of hard labour."

¹ *Reg. v. Langley*, 6 Mod. 125 (K. S. C. 437). In *London* 2 and 3 Vict. c. 47 makes such words, if uttered "in a public place," punishable at petty sessions.

² For the lenient rule, recently established, as to what constitutes an indictable blasphemy, see *Reg. v. Ramsay, Cababé and Ellis* 126; and *Bowman v. Secular Society*, L. R. [1917] A. C. 406. Cf. my remarks in 1 Cambridge Law Journal, 127. The framers of the French code of 1924 for Cambodia, similarly found it necessary to protect current feeling, and imposed penalties on all who mock any idol or defile it (arts. 209-216).

³ On obscene publications, see 39 Calcutta 390.

⁴ For a libel in a "newspaper" a judge's order is needed before taking criminal proceedings against the proprietor or editor.

⁵ In the case of *seditious* libels or utterances, the form of imprisonment must be only that of offenders of the first division (40 and 41 Vict. c. 21, s. 40).

⁶ 6 and 7 Vict. c. 96, ss. 4, 5.

CHAPTER XXII

OFFENCES AGAINST INTERNATIONAL LAW

WITH a view of discharging those duties to the other nations of civilised mankind which are imposed upon us alike by political prudence and by International Law, our criminal law has made provision for the punishment of all persons who (1) infringe the rights of the ambassadors sent to us by foreign nations, or (2) commit acts of piracy, or (3) violate the neutrality due from us to belligerent nations.

(1) As regards offences against the privileges of ambassadors, it is unnecessary to add to the brief mention that has already been made of the statute of 1708¹, which makes it a misdemeanor (with remarkable peculiarities of procedure) to execute even a judicial civil process against the person or goods of any ambassador or his registered servant.

(2) Of piracy according to International Law (or "*piracy jure gentium*") we obtain a good example when the crew of a vessel mutiny, and seize the ship. But, old and famous though the crime is, there is not, even now, any authoritative definition of it². Clearly it is not every felony that becomes piracy by being committed on board ship; for violence is essential, so mere larcenous pilfering would not suffice. The Judicial Committee of the Privy Council has endorsed³ the rule, laid down so long ago as 1696, that piracy is "only a sea term for robbery." But this is not⁴ absolutely precise; for an unsuccessful though violent attempt at pillage would be treated as a piracy if committed at sea; although on land it would not be a robbery, but only an assault with intent to rob. Moreover some menacing thefts which by English law

¹ 7 Anne, c. 12; *supra*, p. 93.

² Stephen, *Hist. Cr. Law*, II. 27; *Dig. Cr. Law*, Arts. 108-122.

³ In *Att. Gen. of Hong Kong v. Kwok-a-Sing*, L. R. 5 P. C. 199.

⁴ Cf. Oppenheim's *International Law*, 2nd ed. I. 340-348.

do technically amount to robberies would not be regarded as piracy if they were committed at sea. Probably the best approach to a correct definition is "any armed violence at sea which is not a lawful act of War"; e.g. by mutineers on board. For a pirate must be one who may be taken to be a source of danger to the vessels of all nations; and therefore those who act solely against a particular belligerent and in the interests of the Power that is at war with it, are not pirates, even though they go beyond their commission¹. Nor will they be, even though their action be spontaneous and without any commission at all from the Power (whether a recognised State or not) whose interests they serve². But, whatever be the precise limits of piracy *jure gentium*, it is at least clear that nothing that does not fall within them would be taken account of, as a piracy, by the common law.

But by statute it has further been made piracy:

(a) For any British subject to commit hostilities at sea, under the commission of any foreign Power, against *other British subjects*³;

(b) For any British subject, or any resident in the British dominions, to take part in the slave trade⁴.

Every piracy, whether of the common-law form or of the statutory, is a felony, and usually punishable with penal servitude for life⁵. But if accompanied by any act that may endanger life it is punishable with death⁶. It is an offence now almost unknown in our courts; no case having occurred since 1894, and that only an unimportant one⁷.

(3) Previously to the nineteenth century, there was no

¹ "Enemies not of the human race, but solely of a particular State"; for the essence of Piracy "consists in the pursuit of private, as contrasted with public, ends"; see *Republic of Bolivia v. Indemnity Co., Ltd.*, L. R. [1909] 1 K. B. 785.

² *In re Tivnan*, 5 B. and S. at p. 680. Cf. L. R. [1909] 1 K. B. 785.

³ 11 and 12 Wm. III. c. 7, s. 7.

⁴ 5 Geo. IV. c. 113, s. 9.

⁵ 1 Vict. c. 88, s. 1, and the Penal Servitude Acts.

⁶ 1 Vict. c. 88, s. 2.

⁷ *Criminal Statistics of England and Wales*, issue of 1901, p. 29.

hindrance in the way of an Englishman's following the profession of a soldier of fortune wheresoever he chose; saving only the claim of the King of England to his continued loyalty, and perhaps to his services if they should be needed¹. The former right of the King was considered to be in jeopardy in James I.'s reign, and an Act (3 Jac. I. c. 4) was passed with the object of preventing subjects of the Crown from being contaminated in religion or loyalty by the Jesuits whom they might meet in Continental armies². The second right appears to have been in the mind of the framers of the statute passed in 1736³, now repealed, which made it felony, without benefit of clergy, to enlist in the service of any foreign prince; an enactment which seems, however, to have remained a dead letter. But the modern development of International Law created a new reason for similar prohibitions; and in the nineteenth century Foreign Enlistment Acts were passed with the object of preserving England's neutrality, by forbidding her subjects to give any assistance to foreign belligerents. In treatises on International Law⁴ the student will find narrated the growth of the principle of Neutrality, as determining the course of conduct to which nations are now bound to adhere, whenever a condition of war exists between Powers with whom they themselves are at peace. The ancient powers of the Crown in England being insufficient to enable it to prevent its subjects from committing acts which might be at variance with the modern conceptions of the obligations of neutrality, Parliament found it necessary to make participation in foreign hostilities a criminal offence. The first Foreign Enlistment Act was passed in 1819⁵, to restrain outbursts of sympathy with the revolt of Spain's South American colonies against her. During the

¹ See Stephen, *Hist. Cr. Law*, III. 257-262; *Dig. Cr. Law, Arts.* 104-107.

² See the preamble to the Act.

³ 9 Geo. II. c. 30.

⁴ See Dr T. J. Lawrence's *Principles of International Law*, pp. 628-658; Oppenheim's *International Law*, 2nd ed. II. 347-377.

⁵ 59 Geo. III. c. 69.

American Civil War, it proved insufficient to prevent the traffic between English shipbuilders and the Confederate Government; and was accordingly replaced in 1870 by a more stringent enactment¹. Under this one, the chief offences forbidden are:

1. To enlist oneself or others—without a licence from the Crown—for service under a foreign State which is at war with a State that is at peace with us².

2. To equip, build³, despatch, or even agree to build, within British dominions—without licence from the Crown—a ship with reasonable cause to believe that it will be employed in such service as aforesaid⁴.

3. To fit out, within the British dominions—without a licence from the Crown—any naval or military expedition to proceed against the dominions of any State that is at peace with us⁵.

Each of these offences is a misdemeanor, punishable with a fine and with imprisonment for a period not exceeding two years, with or without hard labour. All ships or munitions of war in respect of which the offence is committed are to be forfeited to the Crown.

The student must bear in mind that, though it is sometimes said that “International Law is part of the laws of England,” this is true only in that loose historical sense in which the same is also said of Christianity. But an indictment will not lie for not loving your neighbour as yourself. Equally little will it lie for trading in contraband of war, or for the running of a blockade. Both these acts are visited by International Law with the penalties of confiscation; but neither of them

¹ 33 and 34 Vict. c. 90.

² s. 4. This is an offence whether committed within or even without the British dominions.

³ The previous Act (of 1819) forbade nothing short of the ultimate “equipping, fitting-out, or arming” of a ship. See the case of the *Alexandra*, 2 H. and C. 431.

⁴ *Ibid.* s. 8.

⁵ *Ibid.* s. 11; see *Reg. v. Jameson*, L. R. [1896] 2 Q. B. 425.

constitutes any offence against the laws of England, or is even sufficiently unlawful to render void a contract connected with it¹.

¹ See *Ex parte Chavasse*, 4 De G. J. and S. 655. To trade with persons domiciled amongst a nation with whom *our own* country is at war seems to have been regarded in William III.'s time as an indictable misdemeanor at common law; 1 T. R. at p. 85. Cf. a case in 1319 of trading with Scotland during our war with her (Rolle's Abr. *tit.* Prerogative). But in 1817 Sir Samuel Romilly repudiated this doctrine as one which "no one" would now hold (*Life of Robert Aspland*, p. 383). In 1914 it was made a statutory misdemeanor, punishable with seven years' penal servitude, for any one thus to trade with the enemy "during *the present war*," except in such transactions as might be permitted by royal proclamation (4 and 5 Geo. V. c. 87).

CHAPTER XXIII

OFFENCES OF VAGRANCY

THE historical interest and the juridical anomalies of the Vagrancy Act are such as to justify a fuller reference to it here than the importance of the offences created by it might seem to call for. An experienced observer of criminal proceedings has pronounced it, somewhat sweepingly, to be "the most unconstitutional law yet lingering on the statute book¹." It is a survival from a long series of penal enactments—enforced by imprisonment, flogging, enslavement, and death—whereby the legislature strove to grapple with the difficulties created by the steady increase in the numbers of the migratory population. Legislation for this purpose began so far back as 1388; when the dearth of labourers, caused by the devastations of the Black Death in the period 1348–1369, had produced competition amongst employers and, consequently, many migrations of labourers towards the districts where they could profit by this competition. The legislature interposed in order to check both the rise of wages consequent upon all such free exchange between labour and capital, and also some more genuine evils, arising from the mendicancy of such of the wanderers as did not obtain employment, and the dishonesty of many of them who did not even seek for it. To this latter class of vagrants, a dangerous addition was made in the reign of Henry VIII. by the arrival of the first Gipsies. The establishment under Elizabeth of a compulsory parochial assessment, for the relief of the destitute, naturally led to the imposition of further penalties to protect parishes from the arrival of strangers who might become a burden on the local assessment. The modern reform of our industrial legislation and of our system of poor-relief has now swept

¹ Serjeant Cox's *Principles of Punishment*, p. 212.

away almost the whole of the long series of enactments which four centuries had accumulated. But there still remains the Vagrancy Act, 1824; whose provisions might be unintelligible if we did not regard them as a supplement to the old Poor Law, intended to prevent indigent persons from wandering out of their parishes, and to restrain the offences likely to be committed by such wanderers. Offenders against the Act (5 Geo. IV. c. 83) are of three classes; according to the maximum punishment which can be inflicted upon them. Every case is tried at Petty Sessions; though in cases of the third class, as will be seen, the sentence is not pronounced there.

I. The first class consists of the persons who are guilty of the more trivial offences of vagrancy. Typical instances are:

(1) A person whose wilful neglect to work causes him or her, or any of his or her family, to become chargeable to the parish.

(2) A person wandering abroad to hawk goods without a pedlar's licence.

(3) A person begging¹ in any public place², or encouraging any child to do so.

(4) A common prostitute wandering in the public streets and behaving riotously or indecently³.

All these are technically denominated by the Act "*Idle and disorderly persons*." They are liable to a punishment of imprisonment for not more than a month with or without hard labour, or a fine not exceeding £5.

¹ For any able-bodied man to beg was made an offence by 12 Ric. II. c. 7; but a university student might beg if the Chancellor of the University had given him a certificate. At Bridgwater such a certificate is still preserved.

² Metropolitan magistrates have held that a street box-collector can be convicted of begging, if she receives *any* share of the money collected.

³ The Town Police Clauses Act makes it an offence for her simply to "loiter and importune" in a street. But within the precincts of the Universities of Oxford (6 Geo. IV. c. 97, s. 3) and of Cambridge (57 and 58 Vict. c. lx) she commits an offence by merely wandering in a public street and not giving a satisfactory account of herself.

II. The second class consists of the persons who are guilty of the more grave forms of vagrancy. The following instances may be cited (see also p. 179 n. *supra*):

(1) A person convicted for a second time of any of the offences of the former series. The two need not be both of the same species.

(2) A person running away and leaving his wife or child chargeable to the parish.

(3) A person endeavouring to procure alms by exposing deformities or by making fraudulent pretences.

(4) A person found in a building, or inside an enclosed yard or garden, for any unlawful (*i.e.* criminal¹) purpose.

(5) A person gaming², in an open and public place, at some game of chance³, with cards, coins, or other instruments⁴.

(6) A person telling fortunes; or using any subtle craft, by palmistry or otherwise, to deceive⁵, *e.g.* casting astrological nativities.

(7) A person wandering abroad, without visible means of subsistence, and lodging in unoccupied buildings or under a tent or in a cart, and not giving a good account of himself. Between eight and nine thousand persons annually are convicted of thus "sleeping out," as this offence is commonly designated.

(8) A male person (α) knowingly living, wholly or in

¹ Not mere immorality; *Haynes v. Stephenson*, 25 J. P. 329.

² *I.e.* playing for stakes contributed, wholly or even in part, by the *players* themselves; not for a prize given entirely by someone else. See above, p. 47 n. Cf. 36 and 37 Vict. c. 38, s. 3.

³ But a publican commits an offence by permitting gaming at *any* game, even one of skill, on his licensed premises; *e.g.* bowls played for beer.

⁴ This does not cover the depositing of money on a bet made with a person standing in a street to receive bets upon a horse race; *Redway v. Farndale*, L. R. [1892] 2 Q. B. 309.

⁵ A fortune-teller who believes in his skill is nevertheless guilty, *Stonehouse v. Mason*, L. R. [1921] 2 K. B. 818. But an avowed juggler is not; *Johnson v. Fenner*, 33 J. P. 740.

part, on the earnings of prostitution, or (β) persistently soliciting, in public, for immoral purposes. This much-needed prohibition of the calling of a *souteneur* was added by the Vagrancy Act, 1898 (61 and 62 Vict. c. 39). Prosecution for it may also be by indictment.

All these are styled "*Rogues and Vagabonds*." (Both words originally meant simply "wanderers," the "rogues forlorn" of King Lear; from the Latin *rotare* and *vagari*.) They may be punished with imprisonment up to three months¹, with or without hard labour, or with a fine not exceeding £25.

III. The third class consists chiefly of those who have been twice² convicted—or who have resisted arrest when apprehended on even a first charge—of any offence of the second series³. Such a person is technically an "*Incorrigible Rogue*." The procedure is curious. The offender, as in the two previous classes, is convicted at a court of Petty Sessions; but this court can only commit him to imprisonment (with hard labour) until the next court of Quarter Sessions. (In 1924, 143 were so committed.) That court will receive the conviction, and without further accusation can inquire and pass the sentence upon it; which may extend to a year's further imprisonment, with hard labour, and in the case of a male, the prisoner may also be ordered to be whipped⁴.

¹ By 2 and 3 Geo. V. c. 20 the eighth class may be imprisoned for *six* months (or, on indictment, for two years).

² The two convictions need not be for offences of the same species.

³ Other than the eighth, the *souteneur*.

⁴ This is only done in bad cases; *e.g.* where a vagrant, thrice deported, had thrice returned unlawfully to England; or where a man had forced a child to beg, by threatening to drown it.

BOOK III

MODES OF JUDICIAL PROOF

CHAPTER XXIV

THE NATURE OF PRESUMPTIONS AND OF EVIDENCE

A READY knowledge of the law of evidence is essential to all who are engaged in forensic practice. The occasions for applying it arise suddenly; and the rules must be put in force forthwith, before the witness has had time to break them. Hence, as Sir Henry Maine has remarked, there is probably no other legal accomplishment so widely diffused amongst the members of the English bar as skill in appreciating evidence and familiarity with the law relating to it.

The restrictions imposed by the English rules of evidence are in startling contrast to the laxity¹ of proof allowed in Continental tribunals². But the constitutional value of our stringency is great. For it has done much towards producing that general confidence in our criminal courts which has kept popular feeling in full sympathy with the administration of the criminal law, and has thereby facilitated the task of government to an extent surprising to continental observers. In the emphatic words of the late Professor W. L. Birkbeck, Q.C., "the Jury and the law of Evidence are Englishmen's two great safeguards against the worst of all oppressions—that oppression which hides itself under the mask of justice." And these two safeguards are intimately connected; for the

¹ The danger of laxity is illustrated by the fact that, about 1750, to serve a client indicted at the Old Bailey for robbery, an attorney named Brecknock forged an almanac to show that there had been no moon that night (*Burke's Connaught Circuit*, p. 129).

² France, unlike England, permits (a) leading questions, (b) hearsay evidence, (c) evidence of matters only remotely relevant.

one is a product of the other. Our rules of evidence were created in consequence of a peculiarity of English procedure in taking away from the trained judges the determination of questions of fact, and entrusting it to untrained laymen. The Romans had no law of evidence; for, with them, questions of fact were tried in civil cases by a *judex* who was a citizen of rank; and in criminal cases by a court actually forbidden to check a witness¹. But in England jurymen's inexpertness led the courts to establish many rules for the exclusion of certain kinds of evidence that seemed likely to mislead untrained minds.

Whenever, in any country, a tribunal is called upon to decide any question of fact, it must do so either by obtaining actual evidence, or by the easier yet less precise method of employing, instead, some *à priori* presumption. Before commencing a detailed account of evidence, it may be convenient to explain the technical substitutes which thus sometimes replace it. Presumptions are of three kinds.

(i) *Praesumptiones juris* (i.e. drawn by the Law) *et de jure* (i.e. in an Obligatory manner). These are inferences of fact so overwhelming that the law will not permit evidence to be called to contradict them. Such is the presumption (*supra*, p. 49) that an infant under seven cannot have a guilty intention. Such presumptions, though in form connected with the law of Proof, are in truth rules of substantive law disguised in the language of mere adjective rules.

(ii) *Praesumptiones juris*, i.e. inferences of fact which only hold good until evidence has been given which contradicts them. They consequently afford merely a *primâ facie* proof of the fact presumed; a proof which may be overthrown by evidence which negatives it, or by collision with some other and still stronger presumption which suggests a contrary inference. Thus, in the United States, when slavery existed, there was, in the slaveholding States, a *primâ facie* presumption

¹ Mommsen, *Straf.* 422; Strachan-Davidson's *Problems*, II. 119.

that every man of black or mulatto skin was a slave, unless he proved himself to be a freeman.

(iii) *Praesumptiones hominis*, or *facti*. These do not really deserve to be classed amongst legal presumptions; for though, like the two preceding classes, they are inferences of fact, the law does not (as in those two cases) command juries to draw them, but only advises their doing so. A good instance of such a recommendation is the presumption that arises from possession of goods recently stolen (see p. 334).

The presumptions important enough to call for detailed notice here belong mainly to the second class, the *praesumptiones juris*, *sed non de jure*.

(1) There is a presumption of this kind against the commission of any crime¹. This holds good, not merely in criminal trials, but probably also in every civil case where any allegation is made that a criminal act has been committed². Thus in an action on a life-insurance policy, the presumption is against suicide. So strong is this presumption that in order to rebut it, the crime must be brought home to a prisoner "beyond reasonable doubt"; and the graver the crime, the greater will be the degree of doubt that is reasonable. Hence (a) the commission of the crime—that the horse actually was stolen, or the man killed—must be clearly proved; so clearly, that circumstantial evidence will rarely suffice to prove it³. Thus on a charge of murder the fact of death must be very fully proved; which can rarely be done unless the body be produced, mere circumstantial evidence of death thus being usually insufficient⁴. Moreover (b) after proving that the crime was committed, the prosecution must also prove dis-

¹ *Reg. v. Manning* (K. S. C. 446). It must be remembered that there is no similar *general* presumption of innocence of all crimes, alleged or unknown. So if a prisoner assert his good character, he must give proof of it.

² But as to whether the presumption is *equally* violent against a defendant who in a *civil* action is charged with crime, see p. 389 *infra*.

³ *Infra*, pp. 343, 344.

⁴ Hale P. C. ch. xxxix. (K. S. C. 449); 3 Coke Inst. 104 (K. S. C. 449).

tinctly that it was committed by the very person accused; so that when two men are charged with a crime, and it is made clear that one of them committed it, but it cannot be shewn which one, both must be acquitted¹.

Strong as is the presumption of Innocence, it is not too strong to be sometimes rebutted by the presumption of the Continuance of Life²; *e.g.* in a case of bigamy, the presumption that the prisoner would not have contracted a second marriage unless his first wife were dead, may be outweighed if it be shewn that she was alive only five and twenty days before this second wedding took place³. But it may be useful to note that an amount of testimony which is not sufficient to rebut the presumption of innocence entirely⁴ (*i.e.* to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence), may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation⁵. If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being convicted. A frequent illustration of this occurs in the case where a person accused of theft is shewn to have been in possession of the goods shortly after the stealing⁶.

(2) There is a presumption against the commission of any immoral act. Hence cohabitation, with the general reputation of being husband and wife, is, in most cases, sufficient *prima facie* evidence of marriage⁷. And birth is presumed to be legitimate. But the presumption against moral wrong-doing is not so strong as the presumption against criminal wrong-doing. Hence's *A*'s cohabitation with *B* does not constitute

¹ *Rex v. Richardson*, Leach 387 (K. S. C. 448).

² *Infra*, p. 333.

³ 2 A. and E. 540; *secus*, if no more shewn than that she was alive twelve months before the second wedding, 2 B. and Ald. 389.

⁴ For illustrations of such insufficient evidence see *Reg. v. Walker*, Dearsly 280 (K. S. C. 450); *Reg. v. Slingsby*, 4 F. and F. 61 (K. S. C. 452). Contrast *Reg. v. Hobson*, Dearsly 400 (K. S. C. 453).

⁵ *Reg. v. Frost*, 4 St. Tr. (N. S.) 85 (K. S. C. 374). Cf. 7 Cr. App. R. 58.

⁶ *Infra*, p. 334.

⁷ *Doe dem. Fleming v. Fleming*, 4 Bingham 266 (K. S. C. 458).

such strong evidence of his being married to her as will justify his being convicted of bigamy if he proceeds to marry C¹.

(3) *Omnia praesumuntur ritè ac solenniter esse acta*²; i.e. all things are presumed to have been done in the due and wonted manner. This presumption acquires increased weight as the event recedes in time. It is one of great force, especially when applied to public or official acts. Thus from the fact that a church has been frequently used for the celebration of marriage services the court will infer that it had been duly licensed for that purpose. Similarly the fact of a person's acting in a public office (e.g. as sheriff, justice of the peace, or constable), is sufficient *primâ facie* evidence of his having been duly appointed to it³. And there is a presumption that in any Government office the regular course of business has been followed (e.g. that the particulars on a postmark represent the time and place at which the letter was handled in the post). Even in a private establishment the course of dealing may become so systematic and regular as to justify a similar employment of this presumption⁴. Thus a letter left in the ordinary course with a servant for delivery to his master may be presumed to have reached the master's hands. Or a letter, duly addressed and posted, and not returned soon afterwards by the Dead Letter Office, to have been duly delivered. Or a postcard, duly posted, to have been read during its transmission⁵. Again, a deed will be presumed to have been executed on the day whose date it bears⁶. And the holder of a bill of exchange is deemed *primâ facie* to be a "holder in due course." And any one who has entered into a contract is presumed to be of sufficient age to be legally competent to contract⁷.

¹ *Morris v. Miller*, 1 W. Bl. 632 (K. S. C. 459). So, again, identification merely by a photograph is usually *not* sufficient to identify an alleged adulterer (L. R. 1896, P. 75).

² See Irish Rep. [1924] 2. 157.

³ *Rex v. Borrett*, 6 C. and P. 124 (K. S. C. 461).

⁴ *Macgregor v. Kelly*, 3 Exch. 794. Cf. p. 542 *infra*.

⁵ L. R. [1915] 3 K. B. D. 32; [1916] 2 K. B. D. 615.

⁶ *Malpas v. Clements*, 19 L. J. R., Q. B. 435.

⁷ 1 T. R. 649.

(4) The possessor of property, real or personal, is presumed *primâ facie* to be full owner of it¹. In the case of real property, accordingly, the presumption is that he is seised in fee simple.

(5) There is a presumption that any existing state of things will continue for some time further². Accordingly if a partnership or agency is shewn to have once existed, those who allege it to have been subsequently dissolved will have the burden of proving the dissolution. This presumption is often applied in questions as to the duration of human life. Where a person is once shewn to have been living he will be presumed to have continued alive³ for some time longer; though the strength of this presumption will depend upon the particular circumstances of the case, such as his age and his state of health. But if it be shewn that for the last seven years he has not been heard of by those persons who would naturally have heard of him had he been alive, the presumption of his continued existence becomes reversed⁴.

(6) A sane⁵ adult is presumed to intend all the consequences likely to flow directly⁶ from his intentional⁷ conduct⁸.

Besides these obligatory presumptions of Law, there is one discretionary presumption of Fact⁹ which deserves careful

¹ L. R. 1 Q. B. 1; 5 Taunt. 326; 8 C. and P. 537.

² *E.g.* train's, or motor-car's, rate of speed. Or again that Mr Bradlaugh, an atheist in 1882, was still one in 1884; see p. 351 *infra*.

³ *Reg. v. Jones*, L. R. 11 Q. B. D. 118 (K. S. C. 428); *Reg. v. Willshire*, L. R. 6 Q. B. D. 366 (K. S. C. 429).

⁴ *Hopewell v. De Pinna*, 2 Camp. 113; compare 2 A. and E. 540.

⁵ Every man is presumed sane, until the contrary is proved.

⁶ As to the indirect consequences, see 7 Cr. App. R. 140.

⁷ Not from the *accidental* going-off of his gun; 8 Cr. App. R. 211.

⁸ 7 Cr. App. R. 140; 8 Cr. App. R. 211. This is *not*, as is often stated, an irrebutable presumption; see Cr. App. R. 2, 57, 14, 116; Irish L. R. [1910] 2 K. B. 29. Drunkenness, for instance, may rebut it. For its application in Homicide, see p. 140 *supra*.

⁹ It is not a presumption of Law, for it does not need sworn evidence to rebut it; the prisoner's unsworn explanation suffices. For a similar presumption, as to Accomplices, see p. 393 *infra*.

attention—viz. that the possessor of goods recently¹ stolen may fairly be regarded as either the actual thief or else a guilty receiver². His possession raises also—but less strongly—a presumption of his guilty connexion with any further crime that accompanied the theft, *e.g.* a burglary, an arson, or a murder.

We have said that this presumption arises in the case of goods which had been stolen recently. It therefore does not arise until proof has been given that the goods in question have actually been stolen³. Thus it is not sufficient that a tramp is wearing three gold watches and gives quite contradictory accounts as to how he got possession of them⁴. As to what time is near enough to be “recent,” no general rule can be given; for the period within which the presumption can operate will vary according to the nature of the article stolen. Three months has been held sufficiently recent for a motor-car, and four months for a debenture-bond (10 Cr. App. R. 264). But for such articles as pass from hand to hand readily, two months would be a long time; particularly in the case of money. In regard to a horse, it has been held that six months is too long⁵. Eight months is too long to be “recent” for a bale of silk (17 Cr. App. R. 191). And it would seem that, whatever the article were, sixteen months would be too long a period⁶. This presumption does not displace the presumption of innocence so far as to throw upon the accused the burden of producing legal proof of the inno-

¹ *I.e.* recently before he obtained possession; though perhaps long before he was arrested.

² Lord Alverstone, L.C.J., and Phillimore, L.J., habitually advised juries to prefer the latter view. In a case in 1918 the goods stolen in a burglary were found in the prisoner's possession two days after it. Avory, J., said, “Possession so long afterwards is not sufficient evidence of stealing; you had better convict of receiving.” Possession even so early as twenty minutes after the theft may support a verdict of receiving; 17 Cr. App. R. 124, *cf.* 18. 118.

³ *Rex v. Yend*, 6 C. and P. 176 (K. S. C. 468).

⁴ *Cf.* p. 343 *infra*; but contrast, in *London*, no. (iii) on p. 352.

⁵ *Reg v. Cooper*, 3 C. and K. 318 (K. S. C. 468).

⁶ 2 C. and P. 459 (K. S. C. 469), *per* Bayley, J.

cent origin of his possession. He merely has to state how it did originate. If his account is given at, or before, the preliminary examination, and is minute and reasonably probable, then he must not be convicted unless the prosecution can prove the story to be untrue¹. But if he has put forward two inconsistent accounts, his explanation cannot be regarded as satisfactory; and the prosecution need not call evidence to rebut these varying stories. Even if he give an explanation which the jury disbelieve, or give none at all, they are not bound to convict him²; though they probably will do so. For, if his story *might* reasonably be true, the Crown has not given proof "beyond reasonable doubt."

A kindred presumption of guilt arises when a murdered body is found in the possession of some one who is concealing it³.

EVIDENCE.

A litigant, whose case is not made out for him by any Presumption, must convince the tribunal by producing Evidence. The evidence known to our courts admits of a ready classification, according to differences in its intrinsic nature, into three kinds; which are respectively described in the Indian Evidence Act as (a) Oral evidence, (b) Documentary evidence, (c) Material—meaning thereby not "relevant" but "physical"—non-documentary evidence. The same principle of classification has been carried out, in other phraseology and in a slightly different arrangement, by Jeremy Bentham, as follows:

1. "Real" evidence, *i.e.* that consisting in the condition of physical matter, even a living human body⁴; as, for example, a fence, a uniform, a finger-print, a tattoo mark,

¹ If he "raises a reasonable doubt," this suffices; 2 Cr. App. R. at p. 242.

² The absence of satisfactory explanation does not *compel* a jury to convict; *Rez v. Schama*, 11 Cr. App. R. 45, 182. Cf. 13 Cr. App. R. 17.

³ See *The Trial of Wainwright*, p. 226.

⁴ Thus a very close resemblance of features affords "real" evidence of Consanguinity; see my remarks in *Law Quarterly Review*, xxxix. 297.

a wound, an assailant's bitten finger, a smell of prussic acid, the lion-bitten shoulder which identified Dr Livingstone's corpse. Thus blood stains upon a knife are "real" evidence of its having caused a wound¹.

2. "Personal" evidence, *i.e.* evidence which was produced directly by the mental condition of a human being². This may be either,

(a) Involuntary; *e.g.* a blush,

(b) Voluntary, *i.e.* intended to be Testimonial; *e.g.* an affidavit. It may be either,

(i) Oral, or

(ii) Written³.

There is also a very dissimilar, but not less important, mode of classifying evidence, which turns upon differences in its logical bearing upon the question before the court. Considered from this point of view, all evidence is either (i) direct, or (ii) indirect (or, "circumstantial"⁴).

(i) Direct evidence is testimonial evidence to one or more of the *facta probanda* (or "facts in issue"), the essential elements of the question under trial; *i.e.* those facts which, if all of them be proved, render legally necessary a decision favourable to the litigant producing them.

(ii) All other evidence is "circumstantial." This term consequently includes:

¹ "Wash this filthy witness from your hand"; *Macbeth*, II. sc. 2. Once at Ennis an assassin's detached finger, blown off by the bursting of his gun, identified him.

² Or, indeed, of an animal; as when the stolen horse (whose identity is denied), on being taken to prosecutor's yard, goes at once to its own stable and its own stall.

³ So early as 1315 we find a writing used "pur evidence a lenqueste"—by way of evidence to the jury; Y. B. 8 Edw. II. p. 35.

⁴ The student must distinguish between this technical use of the word, and a more popular one, in which it is also applied to evidence, but means simply "full of detail," "circumstantiated," (*e.g.* "his tedious and circumstantial description"); and in which it consequently may be as applicable to a witness's Direct as to his Indirect evidence.

- (a) all "real" evidence¹;
- (b) all "involuntary personal" evidence;

(c) such testimonial evidence as concerns only *facta probantia*; i.e. circumstances which tend to prove, or to disprove, some *factum probandum*, or "fact in issue." Thus in a prosecution for libel, the act of publication by the defendant is a fact in issue; whilst the similarity of the defendant's ordinary handwriting to that on the envelope in which the libellous document was posted, is a fact that tends to prove this fact, and so becomes relevant to the issue.

The following are instances of some of the principal forms of circumstantial evidence familiar in criminal cases: the rank of the defendant, his disposition, his motives, his threats, his opportunities, his preparations, his attempts, his false statements, his silence, his fabrication or destruction of evidence, his flight, his possession of stolen property. But circumstantial evidence is just as applicable in civil cases as in criminal. Thus, in an action on a loan, the defendant may call evidence of the poverty of the plaintiff in order to help to prove that the money was not lent². Yet the controversies with regard to its value have arisen almost entirely in connexion with criminal offences³. For the much greater severity of the penalties that may be inflicted for them has caused many persons to challenge the probative force of circumstantial evidence, as being logically inadequate to support a conviction for (at any rate) any capital crime.

The question thus raised is so fundamental as to need our careful consideration. It is clear that in dealing with any testimonial evidence whatever, whether "circumstantial" or "direct," a jury may be misled. For they have to depend upon:

(1) the accuracy of the witness's original observation of the events he describes;

¹ *E.g.* a weapon *tightly* grasped by a corpse shows suicide, not murder. A small dose of poison suggests murder; a large one, suicide.

² *Dowling v. Dowling*, 10 Ir. C. L. 236.

³ See p. 543 *infra*.

- (2) the correctness of his memory; and
- (3) his veracity.

But in addition to the risks of mistake, forgetfulness, and falsehood, which thus arise even when none but direct evidence is given, there are additional risks to run in dealing with circumstantial evidence. For here the jury have also to depend upon:

(4) the cohesion of each circumstance in the evidence with the rest of that chain of circumstances of which it forms a part;

(5) the logical accuracy of the jury themselves in deducing inferences from this chain of facts. "The more ingenious the jurymen the more likely is he to strain his facts to fit his theory" (Alderson, B.). For "every fact has two faces." Readiness in detecting them and seizing on the favourable aspect is an important qualification in an advocate. Thus excitement on being accused may be due either to consciousness of guilt or to indignant innocence. Lord Jeffrey (*Life*, i. 359), in defending Paterson for poisoning his wife, was met by proof of his having once contemplated that murder; but this very fact he claimed as exculpatory, urging that contemplation of so horrible a purpose must have made a husband ultimately recoil from it.

These fourth and fifth hazards have impressed some writers so deeply as to make them urge that no conviction for any capital offence should be allowed to take place upon merely circumstantial evidence. But those who so contend have not always realised that in every criminal case the *mens rea* must necessarily be proved by circumstantial evidence alone¹ (except when the prisoner actually confesses). Nor have they realised how extremely obvious may often be the inference to be drawn from circumstantial evidence; as, for instance, in a case where the evidence is of an "alibi²." Indeed the

¹ Aided by legal presumptions, e.g. that "a man intends the natural consequences of his act"; or as to murderous malice; *supra*, pp. 140, 333.

² Or of identification by Sir F. Galton's plan of Finger-prints. Of the first million finger-prints recorded by the London police, no two correspond in

circumstantial element often plays a large part in what would pass, at first sight, as excellent "direct" evidence. Thus a witness may depose that he saw *A* point a rifle at *B* and fire it; saw the smoke, heard the crack, and saw *B* fall; and then, on going up to him, saw a bullet-hole in his leg. But still he did not see *A*'s bullet strike *B*; so this fact (the really essential one) depends entirely upon circumstantial evidence; *i.e.* it has to be merely inferred from these other facts which he actually did see¹.

No distrust of circumstantial evidence has been shewn by English law. It does not even require that direct evidence shall receive any preference over circumstantial. Memorable instances of important capital convictions, whose correctness is unquestioned, that were based solely on indirect evidence are found in the trials of Courvoisier for the murder of Lord William Russell in 1840², and of Crippen in 1910 for the murder of his wife (*infra*, p. 345 n.; 5 Cr. App. R. 255). Reference may also be made to *Rex v. Nash* (6 Cr. App. R. 225); and *Rex v. Robertson* (9 Cr. App. R. 189).

Indeed some experienced English and American lawyers have even gone so far as to prefer circumstantial evidence to direct. "Witnesses," say they, "can lie; circumstances cannot." Undoubtedly many famous cases may be cited where

more than seven out of the eleven "characteristics" by which they are classified. Galton estimated that the chances against a single finger of one man being identical with the same finger of another are sixty-four thousand millions to one. The chances against all five finger-prints of a hand tallying with those of another man's hand are much over thirty-two millions of millions to one. An important extension of these records has been "Poroscopy," the examination of the pores (instead of merely the ridges) in the finger-prints. By the Teletograph, finger-prints can now be wired by our police to those of foreign countries. Cf. p. 543 *infra*.

¹ Accordingly, in an old case under unpopular Game Laws, a friendly jury accepted the hypothesis of the poacher's counsel, that the gun fired by his client was not loaded with shot, and that the pheasant died of mere fright. And the superior court did not set aside this verdict (though, it being a civil case, they had full jurisdiction to do so). 4 T. R. 468.

² *The Times*, June 19, 1840; Townsend's *Modern State Trials*, i. 287, where an account will be found of the grave question raised by this case as to the duties of an advocate to a client whom he knows to be guilty.

great masses of direct evidence have proved to be utterly misleading¹. Such cases have shewn that the direct and explicit assertions of scores of witnesses, by being given on *opposite* sides, may create a far greater uncertainty than that which attends the employment of circumstantial evidence².

Three such cases may be briefly referred to.

(1) In the *Leigh Peerage Case*³, the claimant of a title based his claim on his alleged descent from one Christopher Leigh. The proof of such descent was the alleged inscription on a monument, which was said to have formerly stood inside Stoneleigh Church. Thirty witnesses appeared before a committee of the House of Lords, and swore orally to their recollection of the monument; and affidavits to the same effect were made by about thirty others. But these sixty witnesses were contradicted (*a*) by twenty-one other witnesses, who denied altogether that any such monument had existed; and also (*b*) by the fact that their own descriptions of its shape, its colour, and the inscription carved on it were utterly irreconcilable⁴. Accordingly the committee refused to believe these sixty persons.

(2) In *Elizabeth Canning's Case*⁵, thirty-five witnesses swore that a gipsy (of peculiarly unmistakable features) who

¹ For the remarkable error in "direct" evidence of identity in Adolf Beck's case see p. 533 *infra*. Similarly, twenty-one witnesses mistakenly identified one Thompson in 1912; 7 Cr. App. R. 203.

² On the general controversy see pp. 39-52 of Wills on Circumstantial Evidence. The whole volume deserves the careful study of every advocate.

³ A.D. 1832. See the Committee's Report.

⁴ To take, for instance, only some seven out of the first thirty, they thus differed as to the colour of the monument: "nearly black"; "a kind of dove colour"; "black with white letters"; "had been originally white"; "black"; "light marble with dark introduced into it"; "bluish grey." As to its shape: "oblong"; "square at top, but narrowed to a point at bottom"; "square at bottom, but narrowed to a point at top"; "square at top and square at bottom." And as to the inscription on it: "all Latin"; "a great deal of it English"; "all English except *anno domini*"; "all Latin."

⁵ 19 St. Tr. 283. See *Cornhill Magazine*, 1904. A full account of this extraordinary case will be found in an article in *Blackwood's Magazine* for 1860, p. 581, written by a well-known metropolitan magistrate, who considers it "perhaps the most inexplicable judicial puzzle on record"; and also in one contributed by me to the *Law Quarterly Review* in 1897.

had been convicted of a robbery in Middlesex, was in Dorsetshire at the time of the robbery; but were contradicted by twenty-five other witnesses, who swore to having seen her then in Middlesex. Besides shewing by this contradiction how untrustworthy even the most direct testimonial evidence may be, the case further emphasises the same lesson by the instance of Canning's own narrative of abduction and robbery, which was discredited by its sheer improbability, without being contradicted at all.

(3) But the case of *Reg. v. Castro*¹, the longest and most remarkable trial in our legal history, affords the most vivid illustration of the untrustworthiness of direct evidence. A butcher, named Orton or Castro, came forward in 1866 claiming to be Sir Roger Tichborne, a young baronet who was believed to have perished in 1854 in a shipwreck. On Orton's being ultimately tried for perjury, 212 witnesses were examined for the Crown, and 256 for the defence. These included four large groups of people who respectively gave the following items of direct evidence:

- (1) the claimant is not Roger Tichborne;
- (2) he is Arthur Orton;
- (3) he is not Arthur Orton;
- (4) he is Tichborne.

These four vast groups, accordingly, served only to prove each other to be untrustworthy; and the case had therefore to be decided by circumstantial evidence, such as the claimant's degree of education, his ignorance of the affairs of the Tichborne family, and his conduct towards them and towards the Orton family.

These cases shew vividly that testimony, even when a large number of witnesses corroborate each other, may be quite untrustworthy; and therefore that direct evidence is not necessarily to be believed. It may even be less trustworthy

¹ *Annual Register*, vols. for 1871, 1872, 1873, 1874.

than circumstantial evidence¹, if the latter happens to consist of a great number of detached facts, which are severally proved by different witnesses. For, in such a case, each witness's contribution may well appear to him too trivial for it to be worth while to commit perjury about it (though, on the other hand, the same triviality which thus diminishes the chance of mendacity, increases somewhat the chances of mistake and of forgetfulness). But in all other cases circumstantial evidence must certainly be pronounced to be less trustworthy than direct evidence; since a dangerous source of error is introduced by the difficulty of reasoning from the fragmentary items of proof to the conclusion to be proved. For, though "circumstances cannot lie," they can mislead². They may even have been brought about for the very purpose of misleading; as when Joseph's silver cup was placed in Benjamin's sack, or when Lady Macbeth "smeared the sleeping grooms with blood."

Unfortunately it is in the graver rather than the lesser crimes that circumstantial evidence has the most frequently to be relied upon; because in such crimes an offender is the more careful to avoid eye-witnesses. Just as adultery can scarcely ever be proved by direct evidence³, so no deliberately planned murder is likely to be carried out when any third person is at hand. Hence comes it that if a child has died just about the time of birth, though the question whether it was born alive or dead can usually be settled easily in civil actions (friends of the mother, who were present at the

¹ Especially in Oriental countries, where "truthfulness is an eccentricity, and evidence on oath a marketable commodity"; Sydney Smith's *Forensic Medicine*, p. 472.

² As when Bodin tells us that "For the woman not to weep when accused is one of the strongest presumptive proofs of witchcraft that Grillard and other Inquisitors had observed, after having tried and executed very many witches"; *Démonomanie*, iv. ch. iv.

³ Lord St Helier said that if direct evidence of adultery be given, this very fact should inspire doubts as to the truth of the accusation. But the combination of guilty passion with opportunity affords some circumstantial evidence of it.

birth, being called), yet its determination on a criminal trial for infanticide is usually most difficult¹. For it ordinarily has to depend wholly on circumstantial evidence, and this has to be drawn from post-mortem appearances of an ambiguous character. Hence has arisen a widespread impression that the evidence *requisite* to prove live birth is different in civil and in criminal cases; the only difference being, in reality in the evidence usually *available* in the one and in the other.

These various considerations point to the conclusion that circumstantial evidence should be admitted, but admitted only with watchful caution. With this conclusion the practice of English courts accords. (The caution, however, as Stephen² points out, must not be excessive; as when some maintain that there should be no conviction unless guilt be "the only possible inference" from the circumstances. For even in the best-proved case there must always be some possible hypothesis which would reconcile the evidence with innocence³.) The prudent hesitation of English law in regard to circumstantial evidence has found expression in some familiar restrictions upon its employment. Two of these are of special importance.

(a) No conviction for larceny is to be allowed unless the fact that a larceny has actually taken place be proved fully⁴. It is not enough that a penniless tramp has been found to be wearing two diamond rings. To convict him of larceny, it must further be proved that these rings had somewhere been stolen; and this must be proved either by direct evidence or at least by exceptionally strong circumstantial evidence. Usually therefore it will be necessary to bring the owner himself, to prove his loss of some article and its identity with

¹ "Almost impracticable" (Ogston's *Medical Jurisprudence*, p. 220); "almost impossible" (Atkinson's *Medical Practice*, p. 217); "absolutely impossible" (T. F. Smith's *Med. Jur.* p. 224).

² *General View of Criminal Law*, pp. 265-275.

³ Cf. the hypothesis mentioned, *supra*, p. 339 n.

⁴ Cf. p. 196 *supra*.

the article which is the subject-matter of the indictment¹. But it is possible that even circumstantial evidence may be so peculiarly strong as to justify a conviction without any such direct proof; as where a person, on coming out of a barn, is found to have corn (or one coming out of a cellar is found to have wine) concealed under his coat².

(b) Similarly no conviction for homicide is allowed unless the fact that there has been a death be proved fully. This again must be done either by direct evidence (*e.g.* the finding of the body), or by circumstantial evidence of an exceptionally strong character³. Hale and Coke illustrate the importance of this rule by actual instances in which persons were executed for murder, and yet their supposed victims subsequently re-appeared alive⁴. Hence in a case where the father and mother of a bastard child were seen to strip it and throw it into the Liverpool Docks, and the body could not afterwards be found, Gould, J., nevertheless advised that, as there was a bare chance that the child might have been carried out to sea by the tide and picked up alive, the parents ought not to be convicted of its murder⁵. It thus is usually necessary that the body, or some identifiable portion of it, should be found⁶.

¹ *Rex v. Joiner*, 4 Cr. App. R. 64. Hence the frequent impunity of those who make a trade of picking up stray balls on golf-links.

² *Reg. v. Burton*, Dearsly 282.

³ *Rex v. Hindmarsh*, 2 Leach 569.

⁴ Hale P. C. c. xxxix.; 3 Coke Inst. 104 (K. S. C. 449).

⁵ Cited in *Rex v. Hindmarsh*, loc. cit. Doubt has been thrown on this ruling as over-cautious. But *Rex v. Farquharson* (Sussex Assizes, June 29, 1908) is similar. The prisoner confessed having thrown her baby into a tidal stream. It was proved on the next morning the body of a baby of the same sex and age was found on the shore, a mile away, in the line of current. Jelf, J., told the jury that they could not convict unless satisfied that the body found was that of the prisoner's child. In *Rex v. Armstrong* (*The Times*, Aug. 18, 1875), a man had been thrown overboard in a Gold Coast river, rife with sharks, and his body was never seen again. Archibald, J., left the case to the jury, saying, "The rule only requires the jury to act with caution."

⁶ The phrase *corpus delicti*—though often applied to the body of a murdered man, or the stolen goods, or any other Thing which is the subject-matter of criminal conduct—more properly means the criminal Conduct itself, *e.g.* the act of killing the man, or of stealing the goods. See the phrase discussed by Wills (*Circumstantial Evidence*, p. 324).

A memorable instance of the identification of a mere portion occurred in a famous American trial of 1850; that of Professor Webster, of Harvard University, for the murder of Dr Parkman¹. The body had been burnt in a furnace in the Professor's laboratory and the only identifiable portion left was the victim's false teeth; but they fortunately were of a peculiar character.

¹ 5 Cushing 295. Compare, too, Crippen's case, in England in 1910; where no head and no bones were found and no organs that indicated sex, but only pieces of flesh, on one of which was an identificatory scar. And in *Rex v. Peacock*, an Australian case (13 Commonwealth L. R. 619), the murderer had burned the whole of the corpse, yet was convicted. Cf. *Rex v. McNicholl*, Irish L. R. [1917] 2 K. B. 557.

CHAPTER XXV

THE GENERAL RULES OF EVIDENCE

WE now come to consider the chief general rules of evidence. They consist, as we have seen (p. 328 *supra*), mainly of rules of Exclusion. And they are not limited to excluding such matters as are irrelevant to the issue to be tried. For even of relevant testimony there are two kinds which it is highly desirable to exclude¹.

(a) Evidence of matters so slightly relevant as not to be worth the time occupied in proving them. If every circumstance which might tend to throw light on the matters in issue were let in, trials would be protracted to an intolerable length; especially (Maine says) in India, where extraordinary ingenuity is exhibited in discovering every fact which has the remotest bearing on a question under litigation.

(b) Evidence which, though relating to facts that are not only relevant but even important, is itself of such a character that experience shews it to be likely to impress persons of merely ordinary intelligence as being a more cogent proof of those facts than it really is. "Hearsay" affords a conspicuous example of this kind of evidence. The legal rules of evidence were probably developed in consequence of the gradual discovery by judges that certain kinds of proof were apt to be thus accepted, by inexperienced jurymen, with a degree of respect which was undeserved. Hence an adherence to the rules was insisted upon chiefly in cases where it was by jurymen that the evidence was to be weighed. Accordingly where the functions of the Court alone are concerned (as in deter-

¹ "Experienced citizens, and judges of the highest eminence, reach conclusions in their own private affairs by reference to a more relaxed standard than the courts allow. But the issues pronounced upon by courts are attended with such grave consequences that in matters of evidence a standard of admissibility so cautious as to be meticulous is in fact essential" (Lord Birkenhead, L.C.).

mining the sentence for a convicted prisoner), facts are often taken into account which have not been established in accordance with the strict rules of evidence¹. So the law of evidence was not reduced to definite form until long after our forensic procedure had become familiar with the practice of producing witnesses to give evidence to juries. It was in civil courts that—in the seventeenth century—the rules of evidence first arose; and they thence passed to criminal courts, where, however, they came to assume an even greater importance than was accorded to them in civil ones².

A marked distinction between the civil and the criminal views of the law of evidence is that its rules may in civil cases be waived, either by consent or by an order made on a summons for directions; but in criminal cases the rules of evidence are matters *publici juris*, and cannot be dispensed with by consent of the parties³. For, here, others than they have an interest at stake. Not merely the single person accused, but also every other inhabitant of the realm, has an interest in seeing that the prisoner's liberty or life is not taken away except under the whole of the safeguards which the law has prescribed. Thus a photograph, unverified by oath, cannot be given in evidence even if both parties are willing that it should be.

And till recently there was a further grave distinction. For in civil cases, a new trial is not allowed merely because of an improper admission or rejection of evidence at the original trial, unless this error had occasioned "some substantial wrong or miscarriage⁴." But in criminal cases a

¹ But the fact that the prisoner is present and does not deny them, does often give ground for receiving them, even technically, as Admissions.

² "In criminal courts the rules of Evidence are strictly observed; and in six months you learn more of practical advocacy there than in ten years elsewhere" (Lord Brampton).

³ *Reg. v. Bateman*, 1 Cox 156 (K. S. C. 191); cf. L. R. 1 P. C. at p. 534; 11 Cr. App. R. at p. 300. But the quasi-civil character which the early law attached to mere misdemeanors (*supra*, p. 98), has occasionally led, in their case, to slight relaxations of this rule; see, e.g. p. 397 *infra*. America tends to relax it; cf. 190 U. S. 197; 195 U. S. 138.

⁴ Rules of the Supreme Court; Order 39, Rule 6.

jury's verdict of Guilty used to be liable to be quashed if *any* inadmissible evidence for the crown had gone in; even though that evidence was trivial, and though the rest of the evidence was amply sufficient to warrant a conviction. Happily, however, the Criminal Appeal Act, 1907¹, has abolished this scrupulosity. For it provides that "the court may (notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appeal), dismiss an appeal if they consider that no *substantial* miscarriage of justice has actually occurred." A similarly wide power of dismissal had already been adopted by the High Court in dealing with appeals from rulings given about evidence in courts of Petty Sessions².

So, now, a small slip in the evidence will not entitle a prisoner to appeal successfully if (even had an opposite ruling been given) the only reasonable and proper verdict for the jury to return would still have been the same, one of Guilty. In other words, if every reasonable jury not only might, but certainly must, have convicted. Yet there may be a sufficient "miscarriage of justice" to warrant setting aside a conviction³, even though the Court of Appeal itself thinks the conviction justifiable. It is sufficient that it would have been "fairly and reasonably" *possible* for the jury to have refused to convict, had the rules of evidence been strictly observed. For the prisoner has lost that chance of acquittal⁴. Hence a prosecutor should not press for the admission of any evidence which is at all of doubtful admissibility. But, on the other hand, a prisoner's counsel should not be too eager to take objections to evidence; for the jury resent any technicality which closes the avenues to truth, and therefore a successful objection often creates in their minds a prejudice more injurious than the excluded evidence itself would be. American

¹ 7 Edw. VII. c. 23, s. 4; *infra*, p. 497.

² *Shortt v. Robinson*, 63 J. P. 295.

³ Wrongful rejection: 2 Cr. App. R. 119. Wrongful admission: 1 Cr. App. R. 83, 128; 5 Cr. App. R. 14, 233.

⁴ 3 Cr. App. R. 177. Cf. 9 Cr. App. R. 171, 175.

lawyers are often surprised at the rarity, in English trials, of objections to evidence.

If any improper evidence is given, the judge should strike it out of his notes and should bid the jury pay no attention to it. In an extreme case, where the evidence has made too much impression to be counteracted thus, he should discharge the jury and re-try the prisoner before a fresh jury.

We will first explain the fundamental doctrines of Evidence, applicable in all courts whether civil or criminal; and then pass to the consideration of such rules as are peculiar to courts of criminal jurisdiction. The following are the fundamental principles which require our attention.

Rule I. *Omnia praesumuntur pro negante*; or, as the rule is more fully expressed by Justinian, “*ei incumbit probatio qui dicit, non qui negat*¹.”

Thus the creditor who claims a debt has the burden of proving it to be owed². Similarly, in any criminal accusation³, the burden of proof always lies upon the accuser as regards the *actus reus*, and usually also as regards the *mens rea*; while the accused, on the other hand, is entitled to maintain “a sullen silence.” And this duty of every affirmant to make out his case is so clearly imposed by law that, although the judge is not a judge of Fact, yet he is a judge as to the Absence of Fact, and so must not allow the jury to pronounce a verdict in the affirmant’s favour if the only evidence he has produced be so slight that no reasonable man could accept it as establishing the fact which is to be proved. Thus if it is necessary to shew that a transaction took place on a Monday, and the evidence only shews that it took place “either on a Monday or else on a Tuesday,” there would be no case which the judge could submit to the jury; unless

¹ *Dig.* xxii. 3. 2.

² And even in civil cases the defendant’s refusal to give information does not satisfy the plaintiff’s burden of proof; *L. R.* [1922] 1 A. C. at p. 185.

³ *Rex v. Hazy*, 2 C. and P. 458 (K. S. C. 471); *Williams v. East India Co.*, 3 East 192 (K. S. C. 472).

indeed this evidence were eked out by some presumption, as for instance, "omnia¹ ritè esse acta." So, again, if a prisoner be identified only by footmarks, but a hundred similar pairs of boots have been sold in his village. Hence it may quite logically happen that a defendant may be acquitted, and yet that the witnesses against him, on being indicted before the same jury for perjury, may also be acquitted.

Sometimes, however, this rule, that the burden of proof is on the affirmant, may happen to come into collision with the fundamental presumption of innocence²; which throws the burden of proof on any person who alleges misconduct, even though his allegation of misconduct be a *negative* averment, a charge of omission. In such a collision of rules the presumption of innocence must usually be allowed to prevail; and the accuser will generally be required to give proof not only of his affirmations but even of his negations³. To this principle, however, a somewhat perplexing exception arises in those cases where the affirmative fact, which would disprove guilt, is one which (if it exists) lies peculiarly within the knowledge of the litigant whose interest it is that this guilt should be disproved. For in these peculiar cases, so soon as the accuser has given so much evidence as a reasonable man might consider to be sufficient to establish the positive elements of the offence, there then is cast upon the accused person the burden of disproving the negative element by producing affirmative counter-evidence. So if he fail to produce that evidence, this failure may be taken as proving that no such affirmative evidence exists, and accordingly as establishing the accuser's negative allegation. Thus on an indictment for misprision of treason, though it is for the Crown to prove that the prisoner knew of the treason, it yet

¹ *Supra*, p. 332.

² *Supra*, p. 330.

³ In civil actions for Malicious Prosecution the plaintiff has to prove the negative fact that there was "no reasonable cause" for prosecuting; L. R. 11 Q. B. D. 440. So in ejectment for *non*-insurance; 8 A. and E. 571.

may legally leave the prisoner to prove (if he can) that he discharged his consequent duty of disclosing it to some magistrate¹. And similarly in proceedings for practising medicine without a qualification, or selling game without a licence, or producing a play without the author's consent, so soon as the active conduct alleged has been proved, it has often been left to the defendant to prove that he possessed the qualification or licence or consent².

But it is only in this unusual class of cases—viz. accusations of omission, and where the act omitted is such that its performance could *best* be proved by the accused—that a defendant's mere silence can suffice to prove any element of his guilt. Usually, the utmost hostile inference that can be drawn from his silence does not amount to Proof but merely to Confirmation. It is not sufficient to rebut so strong a presumption as that of Innocence; but it is capable of being taken into account to corroborate other evidence which, even uncorroborated, was already legally adequate to effect that rebuttal³. Of course the value of this fact of silence increases in proportion as the ground of defence, about which the defendant is silent, lies the more particularly within his own knowledge. In *Att.-Gen. v. Bradlaugh*⁴, an action for penalties for acting as a Member of Parliament without having taken the oath, the informant alleged that the defendant's religious views made him incompetent to take an oath; and this assertion was supported by evidence. As the defendant could himself have disproved the assertion if it were not true, the jury were directed to take into account the fact that he had not done so. And in divorce proceedings, if the co-respondent is present in court, and yet does not go into the witness-box to assert his innocence, this corroborates (though only slightly)

¹ *Rex v. Thistlewood*, 33 St. Tr. at p. 691. Cf. L. R. [1915] 1 K. B. 618.

² *Rex v. Turner*, 5 M. and S. 206 (K. S. C. 474); *Rex v. Scott* (supplying cocaine without licence), 86 J. P. 68 (A.D. 1921). Cf. Ir. R. [1908] 2. 214. See however the doubt raised in Halsbury's *Laws of England*, xiii. 435-436.

³ Cf. L. R. 10 Q. B. at p. 574. See also 27 L. J. R., Ex. 41.

⁴ *The Times*, July 1, 1884; and on appeal, L. R. 14 Q. B. D. 667.

the evidence given against him. So, in the proceedings, in 1820, on the allegation of adultery against Queen Caroline, great stress was laid upon her failure to bring her devoted attendant Bergami, the alleged adulterer, as a witness to her innocence¹.

The importance of this rule as to a defendant's silence is very great, now that the Criminal Evidence Act, 1898², has allowed all accused persons to give evidence for themselves on oath. For, though this Act forbids counsel (see p. 408 *infra*) to comment on the prisoner's not giving evidence, no such restriction is imposed upon the judge; and indeed jurymen themselves are usually quick to notice the prisoner's abstention.

It should be noted, in conclusion, that there are a few exceptional criminal cases in which the legislature has thrown upon the prisoner the *onus probandi* of a part of the issue. The following are instances:

(i) By the Explosive Substances Act, 1883³, it is a felony, punishable with penal servitude for fourteen years, to be in possession of any explosive substance under suspicious circumstances, unless the prisoner can shew that his possession was for a lawful purpose.

(ii) By the Larceny Act, 1916, s. 28 (2) it is made a misdemeanor for a person to be found by night in possession of housebreaking implements, "without lawful excuse (the proof whereof shall lie on such person)"; see p. 179 *supra*.

(iii) By 2 and 3 Vict. c. 71, s. 24 it is made an offence to be in unlawful possession, in any street or public place, in the *Metropolitan* Police District, of goods which may reasonably be suspected of being stolen, unless the prisoner gives a good account of how he came by them (punishable by two months' imprisonment, with or without hard labour).

¹ Lord Eldon, for instance, in his speech in the House of Lords (Nov. 2, 1820) treats this failure as "amounting to a tacit admission."

² See p. 407 *infra*. Cf. 1 Cr. App. R. 62, 64, 218; *Rex v. Corrie*, 68 J. P. 294; *Ward v. Bp of Mauritius*, 23 T. L. R. 52.

³ 46 and 47 Vict. c. 3, s. 4.

Rule II. The mode in which testimonial evidence is given.

The admirable method adopted is one which was gradually developed by the common-law courts. They ultimately went unfortunately far in excluding evidence, but they elicited in the best possible manner all that was not excluded (whilst in Chancery, far more evidence was always admissible, but the mode of elicitation was such as to render all of it far less trustworthy). The witness must give his testimony not "spontaneously" but "responsively," *i.e.* not in a consecutive narrative, but by brief answers to brief successive questions. This method affords the opposing party an opportunity of objecting, before it is too late, to any question which tends to elicit an answer that would not be legally admissible as evidence. The questions moreover are put by counsel, and not by the judge¹. But in French criminal trials, they are still put through the medium of the presiding judge (for though the prisoner's counsel may, now, carry on an examination or cross-examination, he usually can only do so by getting the leave of the judge for each question²); and the French Code of Criminal Procedure provides that a witness must not be interrupted in his answer. Hence, upon the trial of M. Zola (in connexion with the Dreyfus case) in 1898, more than one of the military witnesses made a continuous speech that occupied over a quarter of an hour; and General de Pellieux was called as a witness expressly on account of his extreme eloquence.

The questions proposed to a witness may occur in as many as three successive series.

(1) He is first "examined in chief" by the party that has called him; with the object of eliciting from him evidence in

¹ Yet so late as *Lilburne's Case* (1649) a strong court told him that a prisoner might not cross-examine the Crown witnesses, but only suggest questions for the court to put (4 St. Tr. at p. 1334).

² "With the result that his cross-examination becomes comparatively ineffective," wrote Lord Russell of Killowen (*Life*, p. 320), after attending the trial of Capt. Dreyfus at Rennes.

support of that party's view of the question at issue¹. The counsel ought to control his witness; and check him from tendering any inadmissible evidence.

(2) He is then cross-examined by the opposite party, in order to diminish the effect of the evidence which he has thus given, and perhaps also to obtain evidence in support of the case of the party cross-examining. For a cross-examination is not, as is sometimes imagined, limited to the scope of the examination-in-chief. But it should be limited to matters relevant to the issue (indirectly relevant at least, if not directly)². Yet irrelevant questions are sometimes asked quite properly, simply to test a witness's intelligence, or to throw a dishonest witness off his guard. Hence judges are slow to interfere with a cross-examiner. Cross-examination may reduce the effect of the evidence given in examination-in-chief either (1) simply by eliciting further facts which tend to harmonise that evidence with the case set up by the cross-examiner³; or (2) by shaking that evidence itself. This latter effect may, for instance, be produced by bringing the witness to admit that his opportunities of observing the facts narrated were inadequate, or that his character or bias is such as to make it unwise to rely on his veracity, or again, by involving him in such inconsistencies of statement as to make all such reliance impossible on (at any rate) this particular occasion⁴.

(3) Finally, a witness who has undergone cross-examination may be re-examined by the party who originally called him; in order to shew the real meaning of the evidence

¹ "Far and away the most important function of an advocate is the examination-in-chief; to think it is the cross-examination is a great mistake" (Atkin, L.J.). "Cross-examination is far easier than examination-in-chief" (Lord Alverstone, *Recollections*, p. 283).

² See 12 Cr. App. R. at p. 76.

³ A prisoner's evidence, in 1911, "I am an industrious man and recently worked for seven years in Devonshire," was cancelled by the cross-examiner's well founded question, "Was it not at Dartmoor?"

⁴ Quintilian's instructions on the cross-examination of witnesses still retain all their value; *Inst. Orat.* v. 7.

elicited by the cross-examination¹. A re-examiner may, for instance, get the witness to explain any ambiguous expressions which he may have used on cross-examination; or his motives (*e.g.* provocation) for any conduct which he may have admitted when under cross-examination². Thus, if the cross-examiner has asked, "Didn't you once assault a neighbour?" the re-examiner may ascertain what this neighbour had done to you that made you assault him. Or if the witness has been asked in cross-examination, "What are you to receive for coming here to-day?" the re-examiner may ask, "And what have your journey here and your loss of time cost you?" But re-examinations are limited strictly to the matters that have been elicited in the cross-examination. Hence, in an action against a ship-owner for negligence in his mode of loading a cargo, after a witness for the plaintiff had stated that deck-loading was perilous, and had consequently been asked by the cross-examiner, "Isn't it usual in summer voyages?" it was held not to be permissible for the re-examiner to ask, "Are those summer deck-cargoes carried at the risk of the ship-owner or of the cargo-owner?" For such a question would go beyond the range of the cross-examination and open up a new inquiry.

It should be added that if either an examiner-in-chief or a cross-examiner has elicited from a witness some portion of a conversation or of a document (even though he may have brought out all that it was legally permissible for *him* to ask for), his opponent becomes entitled to elicit (in his subsequent cross-examination or re-examination) all the rest of

¹ Re-examination is so difficult that the leading counsel rarely trusts it to his junior. A great advocate said that "unless conducted irregularly, it is useless."

² Mr Richard R. Harris has an apt story of a witness, who had sworn to the sanity of a testator, being asked in cross-examination, "What will you get as a legatee if the will be found valid?" "£10,000." But the re-examiner asked, "And what, as next of kin, if it be found invalid?" "£50,000." I have heard a cross-examiner's question "Have you been prosecuted for theft" (which the witness admitted) followed by the re-examiner's "With what result?" and the answer "Acquittal."

that conversation or document, so far as it concerned the same subject. Thus if the examiner-in-chief asks, "Why did you go to that house?" and receives for answer, "Because of a remark my brother made to me," *he* cannot go on to ask what this remark was (for that would be to adduce hearsay evidence): but the opposite party, when he comes to cross-examine, will be fully entitled to ask.

Rule III. Questions put to a witness by the counsel who produces him (whether in examination-in-chief or in re-examination), must not be "leading" ones¹.

A question "leads" if, though it admits of several answers, it suggests that a particular answer is desired by the questioner. Thus an examiner-in-chief must not ask "Wasn't it a wet day?" but, "What sort of weather was it?"; not, "Was it eleven o'clock?" but, "What time was it?"; not, "Was he drunk?" but, "What was his state as to sobriety?"; not, "When he was leaving did he offer you £5?" but, "When he was leaving what did he do?" Leading questions are objectionable because (1) to a false witness they suggest what particular lie would be desirable; and (2) even an honest witness is prone to give an assenting answer from mere mental laziness. But these objections are not likely to apply to a cross-examination, so leading questions are freely permitted there². To certain portions, also, of the examination-in-chief the objections are inapplicable: and therefore, as leading questions save much time, they are allowed even in it in the following cases:

(1) As to undisputed matter; *e.g.* the name, address, and occupation of a witness. If a fact has been deposed to by a witness, and he has not been cross-examined about it, this

¹ Leading questions were objected to even as early as the trial of Lilburne in 1649. The Attorney-General having asked a witness such a question, Lilburne interposed, "I pray, Sir, do not direct him what to say, but leave him to his own conscience and memory" (5 St. Tr. 1337).

² Hence there is often a struggle as to which party shall call a witness; for it must affect the right to cross-examine, and may affect the right to make the last speech to the jury.

may *prima facie* be taken to imply that the fact is undisputed, and accordingly that subsequent witnesses may be "led", with respect to it.

(2) As to the identity of persons or things; *e.g.* "Is this the watch that you missed?" Thus an examiner may ask, "Is the prisoner the man you saw?" Yet a jury would be more fully impressed if counsel asked first, "Would you recognise the man?" and then bade the witness point him out.

(3) For the purpose of contradicting the account which some previous witness, *A*, has given of his own utterances, a subsequent witness, *B*, may be asked a leading question; as, "Did *A* say so-and-so?" But, *before* this is asked, *B* should be got to give his own version of what *A* said.

^{*} (4) Sometimes a witness, in the course of his examination-in-chief, shews himself to be hostile to the party producing him—meaning thereby, not that he merely gives evidence which is at variance with that party's case, but that he shews an evident unwillingness to disclose what he knows in favour of it. Thereupon the judge may, if he think fit, permit the examiner to contend with this unwillingness by asking leading questions.

(5) If the witness merely proves to be forgetful, no such permission will be given to ask questions that are strictly leading ones; yet after an examiner-in-chief has thoroughly tested and exhausted his witness's memory, he will usually be allowed to suggest points for recollection¹, *e.g.* even to ask, "Was nothing said on the subject of the...?"

Rule IV. A witness speaks to his Memory and not to his reasoning or his opinion.

What he remembers will be admissible in evidence even though his recollection of the facts is only weak, *e.g.* "my impression" (but, of course, its value may consequently be trifling). Lord Eldon admitted testimony to the genuineness

¹ Cf. *Courteen v. Touse*, 1 Camp. 43.

of handwriting although it was twenty years since the testifier had seen the alleged writer¹. And a letter has been admitted² as evidence though the witness to its authorship could go no further than to say, "It is in a disguised hand; I believe it to be his writing, but I would not like to swear positively to it³."

A witness should not be asked to answer a question of Law; L. R. [1911] 1 K. B. 484. And it is only for his memory that a witness is brought into court, not for his powers of judgment (unless he be called as a scientific expert, *e.g.* a chemist in a case of poisoning). Hence an ordinary witness must not be asked, either in examination-in-chief or in cross-examination, to draw inferences (18 Cox 178). "As *A* and *B* occupied the same cabin, would *A* have put this message into writing if he meant it for *B* only?" is an argument, not a question. Thus, similarly, on reminding a witness that his answer is a contradiction of the evidence which some previous witness has given, even the common question, "If *A* says the contrary to what you have just told us, is what he says untrue?" is, strictly speaking, one which he need not answer⁴. Similarly a cross-examiner has no right to ask, "Did you go to the prisoner's house as a spy⁵?" for this is a matter not merely of facts but of the view to be taken of those facts. Yet he may ask under what directions the witness went there, for what purpose he went, what he did when there, what report he afterwards made to those who employed him; and

¹ 8 Vesey, at p. 474. The permission has been carried in America even to sixty years; 63 S. W. 194.

² *Reg. v. Bernard*, 8 St. Tr. (N. S.) at pp. 981, 927; cf. 29 St. Tr. 740.

³ No less a judge than Lord Tenterden refused to withdraw from the jury the question as to a defendant's signature although the only evidence of its genuineness was that of a witness who "stated, after much hesitation, that he believed the signature was the defendant's; yet upon cross-examination, after again hesitating several minutes, said he believed it was *not*; but upon re-examination stated, though again hesitatingly, that he believed it was"; *Beauchamp v. Cash*, D. and R., N. P., 3.

⁴ "If you had known this fact, would you have taken the shares?" is similarly inadmissible; 11 Cox 435; cf. L. R. 4 Ch. 719.

⁵ *Reg. v. Bernard*, 8 St. Tr. (N. S.) at p. 935; 1 F. and F. 240.

then, on the strength of the answers, he may urge to the jury that the conduct of the witness was that of a spy.

Rule V. Evidence must be relevant; *i.e.* it must be confined to the question at issue.

A party may prove all circumstances that are relevant to the facts in issue, but no others. The circumstances thus relevant consist not only of those which form part of the facts in issue themselves, but also of all such further circumstances as may be necessary to identify or to explain these. This, for instance, will include, in a criminal case, not only the prisoner's commission of the crime and his guilty knowledge, but also—as facilitating a belief in these—his opportunities¹, motives², and subsequent conduct, and the credibility of the witnesses produced at his trial.

Thus, where a prisoner, accused of murder, bore the somewhat unusual surname of Lamson, evidence was admitted that luggage had been deposited in that name on the day of the murder at a railway station near the scene of the crime; it being proof of opportunity, though very slight proof³. Not only is the prisoner's own conduct relevant, but so soon as it has been shewn that others were combined with him in carrying out a joint criminal purpose, evidence may be given of any conduct of their's which forwarded this joint purpose; even though such conduct took place in the prisoner's absence and though they are not indicted along with him⁴. This rule is of specially frequent application on trials for conspiracy (p. 294 *supra*); but is by no means confined to them. Thus if *A* be indicted for uttering counterfeit coin, evidence may be given of his accomplice *B* going into a market and passing

¹ Evidence that skeleton-keys were found at the house of a person accused of burglary will thus be admissible if the burglary were effected by keys, but not if effected by a crowbar; 17 Cr. App. R. 88.

² Thus if a man be charged with the murder of his *wife*, evidence may be given of his being in love with another woman. So, in a case of theft, evidence of Poverty may be given.

³ *Reg. v. Lamson*, C. C. C. Sess. Pap. xcv. 572.

⁴ *Rex v. Stone*, 6 T. R. 527; *Rex v. Winkworth*, 4 C. and P. 444.

it there, though *A* himself did not go. Similarly, if *A* and *B* have agreed that *B* shall obtain goods at a shop by a false pretence, what *B* says in the shop may be given in evidence against *A*, though he was not there, and even though *B* is not indicted along with him.

The legal limits of relevancy exclude much evidence which, in non-legal matters, would be thought very cogent. Thus if the question at issue be as to how a man acted on one occasion, evidence of the way in which he acted on some other similar occasion is not considered sufficiently relevant to be admissible. Accordingly in civil courts, in a dispute as to what the terms of a contract were, a litigant cannot corroborate his account of them by giving proof of the terms of other contracts which his opponent made on the same subject-matter with other persons¹. Yet evidence of these other contracts would have been quite admissible had the dispute related—not, as here, to what the opponent actually said when making the present contract, but—to what was his state of mind when making it; *e.g.* whether or not it was with a fraudulent intent that he introduced into it some ambiguous terms².

And in criminal courts the same principle serves to exclude evidence of the prisoner's past offences³. It is true that evidence of his *good* character is always regarded as relevant (*infra*, p. 397); illogically, but from historical causes. Yet his *bad* character is not regarded as similarly relevant to the question whether he committed the *actus reus*. Consequently evidence of other (even similar) offences of which he has been guilty cannot be given in order to corroborate the proof of

¹ *Hollingham v. Head*, 4 C. B., N. S., 385. Cf. *Holcombe v. Hewson*, 2 Camp. 391, where the fact that the beer which *A* had sold to *C*, *D*, and *E*, was good was held to be irrelevant to the question whether that which he had sold to *B* was also good.

² *Barnes v. Merritt*, 15 T. L. R. 419.

³ "Are you going to arraign his whole life? Away, away; that is nothing to the matter," protested Lord Holt, two centuries ago; 12 St. Tr. 864. See a useful essay in *L. Q. R.* xxxix. 212. Experience shews that jurors give highly exaggerated weight to evidence of bad character.

his having committed this one. Yet in French criminal procedure such evidence plays a most important part¹.

Nor is there, even in English law, any intrinsic objection to giving evidence of the prisoner's having committed other crimes, if there be any special circumstance in the case to render those crimes legally relevant. Thus burglary may be brought home to a man by shewing that a cigar case, which the burglars left behind them in the house, had that day been stolen from its owner by *him*. Or, to shew the motive of the present offence, some other crime may be disclosed²: as where a murder is accounted for by proving that the deceased had been an accomplice with the prisoner in some previous crime, and consequently was a person to be got rid of; or where an earlier act of sexual passion between *the same two* persons renders probable the further existence of their passion³. And the conduct of a prisoner, even subsequently to his offence, may throw light upon it; as where a thief, on being arrested, shoots his arrestor⁴.

Moreover, a distinction similar to that which we have already (*supra*, p. 360) noticed in civil courts holds good in criminal ones. Whilst the fact of a prisoner's having committed even *similar*⁵ offences is not relevant to the question whether he committed the *actus reus* of which he is accused now, yet, so soon as this *actus reus* has been fully established, evidence of those previous offences may well be relevant to the question of his state of mind in committing this act (his *mens rea*), as soon as that defence has been foreshadowed by the defendant, at either the preliminary examination or the trial (cf. 16 Cr. App. R. 157). Such evidence was originally

¹ In the famous trial of Landru at Paris in 1921, for ten murders, the President began by saying "*It is my duty to enlighten the jury as to the antecedents of the accused.*" The Roman *quæstiones* paid more attention to those antecedents than to the testimony about the crime which was being tried; Strachan-Davidson's *Problems*, II. 119.

² *Reg. v. Neill*, C. C. Sess. Pap. cxvi. 1417 (K. S. C. 483).

³ *Rex v. Ball*, L. R. [1911] A. C. 47.

⁴ Cf. *Rex v. Armstrong*, 16 Cr. App. R. 149. Cf. p. 362 n¹. *infra*.

⁵ *Rex v. Fisher*, L. R. [1910] 1 K. B. 149; cf. 2 K. B. 746.

admitted only in exceptional offences where proof of *mens rea* was peculiarly difficult; like embezzlement, or false pretences. But now its admissibility is recognised as a general rule; in no way limited to peculiar classes of crime¹. On the indictment of a baby-farmer for the murder of a particular child, the Judicial Committee² held that the Crown might give evidence (i) that the bodies of other infants also had been found secretly buried on the premises occupied by the prisoner; and (ii) that several infants had been received by him on payment of inadequate sums similar to that paid in the case of the particular child for whose murder he was indicted. Evidence of other similar offences is now held admissible to disprove Accident or Mistake; or to prove guilty Knowledge; or (if more than one previous offence can be shewn) to prove, as in *Makin's Case*, a System of conduct. On a trial for administering an abortive drug, evidence of other similar administrations cannot be given to help to prove this administration; but may to prove the intent, if the act be admitted but criminal intent be denied. In one instance the legislature has even extended this principle to evidence of offences that are not of a precisely similar kind. For under the Larceny Act, 1916, s. 43 (1), on indictments for receiving stolen goods, so soon as it has been established that the prisoner did have possession of the stolen property, the fact of his having been convicted, within five years previously to the receiving, of "*any offence involving fraud or dishonesty*" is admissible to shew guilty knowledge³. And on indictments for receiving stolen goods the same section, s. 43 (1) also admits evidence of the fact that other property, stolen

¹ Evidence may be given even of crimes *subsequent* to the one under trial; *Reg. v. Rhodes*, L. R. [1899] 1 Q. B. 77; cf. 6 Cr. App. R. 205.

² *Makin v. Att.-Gen.* (for New South Wales), L. R. [1894] A. C. 57 (K. S. C. 485). (This decision is by some regarded as declaring the evidence admissible to prove, not merely the *mens rea*, but even the act of killing. See *per* Pickford, J., 5 Cr. App. R. 240; *per* Lord Atkinson, 6 Cr. App. R. 37.) Cf. *Rex v. Smith*, 11 Cr. App. R. 229 (the "Brides in the Bath" case).

³ If prisoner has had seven days' notice of this evidence.

within a year before this offence, has been in the defendant's possession.

By a distinction precisely the converse of that which is thus applied in the case of a prisoner's character, the badness of a *witness's* character is always relevant, but its goodness is not. For the party by whom witnesses are produced cannot (in the first instance) corroborate them by offering proof of their good character or even of their having on former occasions told the same tale they now tell¹. But the party hostile to these witnesses may discredit their characters, or may prove that at one time they told a different story. Sometimes this is done by mere cross-examination²; sometimes by evidence, *e.g.* evidence to shew:

(1) That the witness is notoriously mendacious. This course is now very rare; for it was decided in *Rex v. Watson*³ that no evidence can be given of any particular misconduct of his, and the only question to be asked is the vague general one, "Is he to be believed on his oath³?"—as if mendacity were a fixed habit that did not vary with subject matter and with personal interests. The party who has produced the witness can never discredit him thus, even if he turn out utterly hostile. When such evidence is given it entitles the other party to contradict it by proof of his witness's good character for veracity (19 St. Tr. 588, 595).

(2) That he is biassed. Bias may, for instance, be shewn by evidence that the witness has received money, or has offered money to other witnesses; or that he has threatened revenge⁴. And even mere relationship to the litigant who produces him is some evidence of bias⁵. But no proof of bias

¹ Similarly, evidence to corroborate a prisoner's defence by shewing that he told his present story before ever he was accused, is considered too remote to be relevant. A far-seeing offender might tell an apt lie.

² The celebrated cross-examination of the spy, Castles, by Sir Charles Wetherell deserves study; 32 St. Tr. 284.

³ 32 St. Tr. 486; *Reg. v. Brown*, L. R. 1 C. C. R. 70.

⁴ *Rex v. Yewin*, 2 Camp. 637 (K. S. C. 543).

⁵ *Thomas v. David*, 7 C. and P. 350 (K. S. C. 544).

can be given unless the witness has been cross-examined on the point, so as to have had an opportunity of explaining the circumstances.

(8) That on some relevant fact, to which he now deposes, he had previously made a statement inconsistent with what he now says. Here, again, before proof can be given of the discrediting statement, the witness's attention must be specifically drawn to it in cross-examination, in order that he may, if possible, explain it. In criminal cases this mode of discrediting is very common¹; because most of the witnesses at the trial have already given evidence, viz. at the preliminary examination before the justice of the peace who committed the prisoner for trial. At common law, if the previous statement were in writing (*e.g.* a deposition² at this examination for commitment), the cross-examiner had to put it in as part of his own evidence (thereby giving the other party a right to a speech in reply), before even asking the witness about it. But now by statute (28 and 29 Vict. c. 18, s. 5) he need not put it in, unless he desires actually to contradict what the witness says in cross-examination. Yet the judge may use it for such a contradiction, although the cross-examiner has not put it in. Even if put in, it merely cancels the evidence previously given, and must be allowed no probative effect beyond this³.

Even the party who produces a witness is allowed to discredit him by thus proving a previous inconsistent statement of his, should he turn out to be (in the opinion of the judge) hostile to that party; *i.e.* not doing his best to answer frankly (*cf.* p. 357 (4) *supra*). And, even without any such recognition of his hostility, the assertion which he now makes may be contradicted by the subsequent witnesses, called on the same

¹ Even in civil cases, the opposite party occasionally calls for any signed "proof" of his intended evidence, which the witness may have given to the solicitor; *cf.* p. 384 n². *infra*. But there is no obligation to produce it.

² See p. 457 *infra*. But word for word agreement with a deposition looks like learning by heart; and so is far more suspicious than slight variances.

³ 1 Cr. App. R. 156; 17 Cr. App. R. 64.

side, if it be a fact which is intrinsically relevant to the issue. For clearly those witnesses who could have spoken to this fact if they had been examined before he was, cannot be excluded by the mere accident of his having been called first¹.

Besides these three modes of discrediting a witness by the evidence of other persons, his credit may, as we have said, be shaken by his own² cross-examination, and shaken in a manner much more extensive³. For he may be cross-examined not only on the matters already mentioned—his mendacity, his bias, his former inconsistent statements—but as to any past conduct of his of a discreditable character⁴. This rule is often made use of to elicit facts which are admissible for this purpose, with the real purpose of employing them to bear upon the main issue in the case; though that bearing is too remote to render them legally admissible on the ground of relevancy to it. Thus on an indictment for ravishing *A*, a letter written to the prisoner immediately afterwards by *A*'s father, demanding a pecuniary compensation, cannot be put in evidence to discredit *A* herself (unless there be legal proof that she authorised its being written). But, if her father be called as a witness he can be asked about it, to discredit him; and it will thus effect, indirectly, the more important result of discrediting her.

It must be noted that the answers which a witness gives to questions that are put merely to discredit him, are "final"; *i.e.* the cross-examiner cannot call evidence to disprove them, for thus to digress into the determination of side-issues might render a trial interminable⁵. (The legislature has, however,

¹ *Greenough v. Eccles*, 5 C. B. (N. S.) 803; cf. 8 Bing. 50.

² But not by cross-examining *another* witness about him.

³ But the party *producing* a witness cannot put to him discrediting questions.

⁴ This power of putting painful questions, which may revive even long-forgotten frailties, would be intolerable but for the high sense of responsibility traditional at the English bar.

⁵ Hence if to a cross-examiner's question "Did you once seduce a woman?" the witness *A* has answered "No," a subsequent witness *cannot* be asked, even in cross-examination, "Did *A* once tell you that he had seduced *B*?"

created an exception in one case, in which the disproof is peculiarly simple and peculiarly important. For by 28 and 29 Vict. c. 18, if a witness denies, or refuses to answer about, having been convicted of a crime, evidence of that conviction may be given.) If, however, the discreditable act were relevant not merely to credit but also directly to the actual issue in the litigation, evidence might of course be given, in regard to it, in contradiction of the witness; for such evidence would have been intrinsically admissible even if he had never been examined. For instance, on an indictment for rape, if the prosecutrix be cross-examined as to her unchastity with third persons, and deny it, she cannot be contradicted; and consequently, witnesses to her good character cannot be called by the prosecution to confirm her denial. But if the question had related to her previous unchastity with the prisoner himself, or to her being a common prostitute, her denial might be contradicted. For these facts, if true, would not merely affect her credit but would be relevant to an essential part of the issue, viz. whether the act now complained of took place against her will. Similarly, if in cross-examination a witness denies having been drunk at the time when he watched the events that are in issue, he may be contradicted on this point by direct evidence.

Thus evidence cannot be called to contradict a witness, except as to his answers about (1) his bias¹, or (2) his own previous inconsistent statements, or (3) facts which the opposite party could have proved as part of his own case.

Rule VI. The best evidence must be given or its absence must be accounted for.

The rule is still usually stated in this traditional and general form; but its actual application² is limited to one particular case, viz. the proof of the contents of a written

¹ *E.g.* if he has denied having expressed hostility to the prisoner.

² See Wigmore, *Evidence*, §§ 1173, 1287; Chamberlayne, *Evidence*, § 480; Thayer, p. 488.

document. The mere fact that the document has actually been drawn up, or the mere condition of it, may be proved by secondary evidence; that is, by the production, not of the document itself, but of remoter evidence derived from it through some intermediate channel (the recollections, for instance, of a witness who has seen it). But if, on the other hand, it is desired to prove what the actual contents of the document were, then the rule now under discussion excludes—even in cross-examination—all mere secondary evidence. A witness must not be asked on what day an unproduced letter was dated; but he can be asked on what day he received it. So where it is sought to give the contents of a message sent by telegram in evidence against the sender of it (*e.g.* when the surgeon, whom it summoned, sues for his fee), the original paper handed in by him at the post-office must be produced. The subsequent paper, which the telegraph boy delivered, cannot be given in evidence for this purpose (unless it be proved that the first-mentioned paper has been destroyed or lost). It, however, would be otherwise if the object were to prove not what message was sent, but what message was in fact received (*e.g.* when the surgeon summoned is sued for negligence); for then the positions would be reversed, and the paper brought by the boy would be the necessary “best evidence.”

Accordingly when, in any litigation, a witness is asked, “Was any bargain made on this subject?” the opposing counsel will probably interpose by asking, “Was it made in writing?” For if it were embodied in written words, the witness must not give parol evidence about them. Thus a witness, as Lord Eldon said, “may be asked whether a particular house was purchased and conveyed; but, if he states that it was conveyed by a written instrument, then the examination must stop there.” Similarly it would not be permissible to ask, “Did you write a note to your master asking to be taken back into service?” for that would be to elicit the contents of the note without producing it. The

utmost that the examiner can do will be to ask, "After leaving your master's service did you write to him?" and, on getting an affirmative answer, to proceed: "After so writing were you taken back into his service?"

But the rule only applies where the object desired is to prove what actually were the contents of a document. Hence where words have been uttered orally, by a person who apparently read them out from a paper, if the object be to shew, not what the words of the document itself were, but what he actually did utter, any persons who heard him may narrate what they heard, and his paper need not be produced. For the words he uttered may have varied from the written ones¹. Similarly, such a question as, "What did you tell your clerk to state in the letter?" would be quite permissible, if the point to be proved be not the actual contents of the letter, but merely what the witness intended those contents to be; (as, for instance, where the only object is to shew his knowledge of the matters thus mentioned by him to the clerk).

It will, however, sometimes happen that no primary evidence is available. In that case the production of the document will be dispensed with, and secondary evidence may take its place. The following are the most frequent instances in which this occurs:

(1) When the writing has been destroyed; or where, after proper search having been made for it, it cannot be found². Thus on a trial for forgery the contents of the note, which was alleged to have been forged, were allowed to be proved by parol evidence, because the prisoner had himself swallowed the note³.

(2) When its nature is such that it is physically impossible to produce it; as in the case of a placard posted on a wall⁴,

¹ *Rex v. Sheridan*, 31 St. Tr. 673-674; cf. 1 St. Tr. (N. S.) 558.

² See the remarkable case of Lord St Leonards' lost Will; L. R. 1 P. D. 154.

³ 14 East 276. Similarly when the ledgers, which a witness was about to produce, were stolen from him at the porch of the Central Criminal Court (*supra*, p. 211) oral testimony became admissible instead.

⁴ *Rex v. Fursey*, 6 C. and P. at p. 84 (K. S. C. 384).

or of a tombstone. This has at times been extended to cases where it was not absolutely impossible, but only extremely inconvenient, to produce the writing; as when, in *Rex v. Hunt*¹, parol evidence was admitted of the inscriptions on the banners and flags that had been displayed at a meeting. Similarly, if the possessor of the document has, and insists on, a legal privilege to withhold it (cf. pp. 383, 384 *infra*).

(3) When the writing is in the possession of the opposite party² and, though notice³ has been given to him to produce it, he fails to do so. Sometimes the very nature of the litigation (*e.g.* an indictment for stealing this very document) is of itself a sufficient notice to him that he is expected to produce it⁴.

(4) When the secondary evidence which is tendered consists of an admission, by the opposite party himself, as to what the contents of the document were⁵.

(5) When the original is a "public" document, it is now provided by statute that it may be proved by means of an examined copy⁶.

(6) When the original is an entry in a banker's book it is now provided by statute that it may be proved by a copy of the entry, if verified by some officer of the bank, either orally or even by mere affidavit⁷.

¹ 3 B. and A. 566.

² A private prosecutor is not a "party."

³ The student must distinguish (1) this notice to Produce, given by one party to the other, to secure the right to tender secondary evidence, from (2) the notice to Admit, given similarly, to save the expense of proving the genuineness of documents, and (3) a Subpoena *duces tecum*, issued by the court, to compel a witness to bring a document to the trial.

⁴ Prosecution of a motorist for excessive speed implies notice to produce his licence.

⁵ *Earle v. Picken*, 5 C. and P. 542.

⁶ 14 and 15 Vict. c. 99, s. 14. Copies are of various kinds. "Exemplified," under the seal of a tribunal; "Official," signed by the custodian-officer; "Attested," bearing a certificate from some one who has checked it; "Plain" (but perhaps examined with the original by a witness who can swear to it).

⁷ 42 and 43 Vict. c. 11.

The rule of Best Evidence goes no further than simply to postpone all secondary evidence whatever of the contents of documents to the primary evidence of them. It takes no heed of the different degrees of value of various kinds of secondary evidence. For instance, it will allow a witness to give his mere recollections of the contents of a document, even when some attested copy of it is available. And the rule ceases to have any operation at all, where the Thing under discussion is not a written document. For where, in any litigation, the quality or condition of some chattel is in dispute, the law does not similarly require the chattel itself to be produced in court for actual inspection¹. If the purchaser of a horse, or of a diamond-ring, or of corn, refuses payment of the price because the animal is unsound, or the jewel is false, or the grain does not come up to sample, he need not produce the horse, or the ring, or the sample (though he will arouse suspicion by not producing it). Similarly, in an action to recover compensation for the damage sustained by a bicycle which a cart has run down, it will not be technically necessary at the trial to produce the bicycle. Equally little is any principle of Best Evidence applied to the proof of handwriting; for it is not essential that the party, who is alleged to have signed a document, should himself be called to prove, or (as at a trial for forgery-) to disprove, his handwriting. And to prove that a person holds a public office (*e.g.* that of a justice of the peace or of a solicitor), it is sufficient to shew that he is in the habit of acting as a holder of it, without producing his written commission which conferred the office; (*supra*, p. 332).

¹ So difficulty may arise if a "document" be offered in evidence—not as a Statement, but—merely as an identificatory mark on a Thing. In *Reg. v. Pierce* (45 C. C. C., S. P. at p. 377) Willes J. and Martin B. allowed a witness to identify two debentures by stating their numbers, without producing them; just as oral evidence of the brand on an ox or the number of a cab would be similarly receivable. For identification Martin B. had allowed a witness to describe even the indorsement on a deed; and had been approved by the Queen's Bench. Cf. 3 Adam 143 (Scotch); contrast 33 C. C. C., S. P. 253. But even mere ticks in a stock-book, against items sold, need production if tendered as Statements; 38 C. C. C., S. P. 126.

Finally it may be noted, as a further illustration of the limited application of the "best evidence" principle, that the law does not prescribe any preference between different species of Primary evidence. Thus the testimony of a witness who had watched through a telescope an assault which took place a mile away, would not be postponed to the testimony of the actual victim of the attack.

Rule VII. Hearsay evidence is inadmissible. That is to say, a witness who has received from some one else a narrative of facts, even though they be the very *facta probanda*, is not allowed to give this narrative in evidence¹.

The untrustworthiness of mere Hearsay was recognised in England as early as 1202; and in the same century Bracton repeatedly disapproved of all such "*testimonium de auditu alieno*"². Yet when the procedure of trial by jury and witnesses became established, hearsay evidence was at first freely admitted. Thus, in 1603, on the trial of Sir Walter Raleigh, a witness was allowed to narrate that "Mr Brooke told me he had heard of a most dangerous plot." But in 1660, we find hearsay only received after direct evidence has been given, and merely to corroborate it; and thus not admissible of itself (5 St. Tr. 1195). And within another generation the full modern principle of exclusion had become accepted—probably before any other rule of evidence. For in 1688, the one caution which Algernon Sidney's counsel could furnish him with was to bid him, "Desire that evidence of Hearsay from witnesses may not be given; and *suffer it not* to be given." Accordingly in 1684 (9 St. Tr. 1189) Lord Jeffreys, C.J., says, "What the witness heard from the woman is no evidence. If she were here herself and did say it, but not swear it, we

¹ Thus a witness cannot prove his own age; for he only knows what older people have told him about it.

² Pollock and Maitland, ii. 620. The Romans recognised its defects even in the time of Plautus: "*Pluris est oculatus testis unus quam auriti decem: qui audiunt, audita dicunt; qui vident, plane sciunt*"; *Trucul.* ii. 6. Yet in 1598 even Bodin said, "In cases of witchcraft, common repute is almost infallible" (*Démonomanie*, iv. 4).

could not hear her; how then can her saying it elsewhere than here be evidence before us? I wonder to hear any man that wears a gown make a doubt of it!" Hence is it that a witness cannot prove the date of his own birth (*Rex v. Rishworth*, 2 A. and E. 476, 9 C. and P. 722), though the American courts, sacrificing logic to convenience, do permit this. Yet he may prove that his birthday has always been kept on the date mentioned in the birth certificate of a person of his name.

But in continental countries, even now, hearsay evidence remains acceptable. In the Dreyfus case the great bulk of the evidence given was the merest hearsay¹. For on the continent, as in Scotland, trial by jury was not introduced until so late an epoch that the admission of hearsay had become a practice too inveterate to be shaken. Before that introduction it was comparatively innocent, for when trained judges are to determine the facts in dispute they can trust themselves to give hearsay evidence only its due weight.

The peculiarly emphatic exclusion of hearsay in England is due to its untrustworthiness; since it is derived ultimately from an absent witness who was not on oath and did not undergo cross-examination². And the exclusion is further justified by the necessity of avoiding that prolongation of trials which would be produced by the admission of a range of evidence, so indefinitely wide, and yet of such trifling value.

Hearsay usually appears in the shape of some other person's statements, written or oral; but evidence of his mere conduct, unaccompanied by any statement, will be rejected on the same principle, if it be adduced for the same purpose, viz. that of shewing his state of mind with regard to some fact

¹ In a famous Belgian trial (1901) the following fifth-hand evidence was received, "He told me that Mme. Lagasse had heard from a lady that Van Steen told her he knew the prisoners were guilty." In the great French case of Calas, A.D. 1762 (*Encyc. Britannica*, Art. *Calas*), his threat to murder was only proved at sixth-hand.

² Hence "Did you find, as a result of your inquiries, that he had done much business?" is not a lawful question.

which it is sought thereby to prove. As was said by Baron Parke, the conduct of some deceased sea-captain, who examined every part of a vessel and then deliberately embarked in her with his family, cannot be given in evidence to shew that she must have been seaworthy¹.

It is important to notice that the rule only excludes evidence about such statements or conduct as are merely narratives of a fact that is in dispute in the litigation; but not evidence about such statements or conduct as actually constitute such a fact, *i.e.* when "saying is doing." Thus in an action for slander, a witness can of course narrate the defamatory words which he heard the defendant utter; they are in issue. And, similarly, evidence may be given of any statement which, though not itself constituting a fact relevant to the issue, nevertheless accompanied and explained² some relevant act. For such a statement throws light upon the character and purpose of this act, and so is itself a part of the *res gestae*. Thus a slap may have been accompanied by a greeting or by a curse. A gas-fitter rushes excitedly off a landing-stage, exclaiming, "My God! the landing-stage is on fire. I did it³." Probably the statement need not in law have been uttered by the very person who did the act. It is sufficient if it were uttered in his hearing and he can be taken to have assented to it; as when evidence was given against Lord George Gordon of the various seditious cries uttered by the rioters whom he led (21 St. Tr. 535). Similarly not only the remarks made by persons engaged in drilling, but also those made by persons who were watching them drill, have been allowed to be given in evidence against the former to shew the illegal purpose of the drilling⁴. And when a libellous picture has been exhibited in public, remarks uttered by the spectators whilst looking at the picture may be given

¹ 7 A. and E. at p. 388.

² But if a witness say "He came with a letter in his hand," he must not add "and he said 'My father is dead.'" For these words explain no act.

³ This utterance secured a verdict for £200,000 against the Liverpool Gas Company; *The Times*, Aug. 23, 1875.

⁴ 1 St. Tr. (N. S.) 1071.

in evidence to shew whom the figures in it were meant to represent¹. But the rule is confined to utterances that are strictly simultaneous with the *res gestae*²; and even such as are made only a few minutes after the transaction is over will be regarded as mere narratives, and excluded³.

In some criminal cases a complaint, not uttered till some time after the conduct complained of, is admitted in evidence. But this is only allowed after the person complaining has given testimony as a witness in the case⁴; and, even then, only for the purpose of supporting⁵ that testimony (by shewing the complainant's consistency of conduct), and not as being intrinsically any evidence⁶ of the alleged act complained of. (So in a wife's suit for judicial separation, on the ground of cruelty, the question, "Did the petitioner complain to you of her husband's cruelty?" is always allowed to be put, even by the examiner-in-chief, to such of her witnesses as are examined subsequently to herself.) Thus, in cases of violent sexual assault on a female, evidence that she complained about it, on the first reasonable opportunity, will be admitted in criminal (but not in civil) proceedings if she has been examined as a witness⁷. And, besides the fact of the complaint's having been made even the details⁸ uttered

¹ *Du Bost v. Beresford*, 2 Camp. 511 (K. S. C. 497).

² *Aveson v. Lord Kinnaird*, 6 East 198 (K. S. C. 498).

³ *Reg. v. Beddingfield*, 14 Cox 341 (K. S. C. 501). A dumb man's fingered narrative is "Hearsay," not an Act. C. C. C. xc. 979.

⁴ Hence not at all, if she die before giving evidence.

⁵ But it does not "corroborate" it; for it comes only from the person to be corroborated; 18 Cr. App. R. 123. Cf. p. 363 n¹. *infra*.

⁶ Hence any details in it, not repeated by her at the trial, are not evidence at all.

⁷ This illogically lax criminal rule is a survival from the old "Appeals" of Rape, before the law of Evidence arose; great importance being attached in them to prompt complaint.

⁸ *Reg. v. Lillyman*, L. R. [1896] 2 K. B. 167 (K. S. C. 503). The complaint must not be caused by *leading* questions (12 Cr. App. R. 280). And perhaps should not be *written* complaint; for the recipient has not the opportunity of noticing the complainant's demeanour. *Rex v. Osborne*, L. R. [1905] 1 K. B. 551, shews that the permission as to details is *not* limited to those sexual crimes in which Consent would be a defence.

in it are now held admissible. The whole rule is now extended even to sexual offences against males¹. But in non-sexual crimes, the details of a complaint certainly cannot be admitted; and the more recent authorities deny that even the bare fact of a complaint's having been made can be. In ordinary civil cases the strict rule against Hearsay clearly excludes that fact².

There are, however, some well-ascertained and much more important cases in which mere hearsay (*i.e.* a narrative of the past), is freely and fully admitted as evidence. Of these exceptions we may now discuss such as are accepted equally in civil and criminal tribunals (postponing for the present some others which only concern the latter). The following deserve careful attention:

(1) Admissions made by, or by the authority of, the party against whom they are produced³. (The term "admission" is here used in the wide sense which it always bears in civil cases; though in criminal cases it is usually applied only to those individual details of fact which do not involve the guilty intent, an admission of full guilt being styled a "confession.") The authority to make it need not expressly relate to the particular statement; so a man will be responsible for admissions made on his behalf in the ordinary course of business by his partner or his agent, or even by some one to whom he has referred a third person for information on the topic⁴.

An admission may be made either expressly, in words (either spoken or written), or tacitly, by mere silent conduct. An instance of an express admission is furnished by the case

¹ *Rex v. Camelleri*, 16 Cr. App. R. 162.

² *Beatty v. Cullingworth*, 60 J. P. 740; (C. A.) *The Times*, Jan. 17, 1897.

³ The admission is, of course, evidence only against that party and not against others whom he may accuse in it. *E.g.* an adulterous wife's diary is evidence against herself but not against her adulterer; a landlord's notice to quit on a day named is evidence against him that the years of tenancy end on *that* day, but not against the tenant.

⁴ *Williams v. Innes*, 1 Camp. 364 (K. S. C. 507).

of *Maltby v. Christie*¹. One party to the case, who was an auctioneer, had issued a catalogue in which he described certain goods as being the property of a bankrupt; and this fact was held to render it unnecessary for the other party to produce any further proof that the person to whom they belonged had really become bankrupt. A tacit admission arises when, at a policeman's demand, a motorist produces a licence; thereby implying that he is the person named in it. A less simple but more frequent illustration is afforded whenever a statement is uttered in the presence of some one who would naturally contradict it if it were not true, and who nevertheless remains silent. *Qui tacet consentire videtur*; he impliedly admits its truth. In this way, hearsay is often rendered admissible by the question, "Was the other party [to this litigation] present, within hearing, when you heard that man say this?" Thus in an action for breach of promise of marriage, if the plaintiff was heard to say to the defendant, "You always promised to marry me," his mere silence is sufficient corroboration of her statement². Yet the mere fact of the other party's having been present will not let in this evidence, if the circumstances were such as to make it unlikely that he would contradict the statement even if he knew it to be false. And since the act of admission lies purely in his demeanor (*e.g.* his silence), and the statement uttered before him only becomes admissible as accompanying and explaining that demeanor, it follows that if his conduct involves no admission³—*e.g.* usually, if he denies the truth of the assertions—then, though uttered in his presence, they cannot be taken as evidence against him⁴. And even without his going so far as to deny it, his demeanor may fall short of constituting any such admission as will render it evidence. Thus

¹ 1 Esp. 340 (K. S. C. 506).

² *Bessela v. Stern*, L. R. 2 C. P. D. 265. Similarly on being accused of crime; 13 Cr. App. R. 215; contrast 21 Cr. App. R. 23. Cf. p. 351 *supra*.

³ It is for the judge to say if there is evidence of conduct that *might* involve it; and then for the jury to say if it *did* involve it.

⁴ *Rex v. Christie*, L. R. [1914] A. C. 545; contrast 14 Cr. App. R. 1.

when a magistrate brought a prisoner into the presence of his dying victim, who then made a statement to the magistrate about the crime, which the prisoner did not contradict, this statement was nevertheless held to be inadmissible¹. For the prisoner might well have been kept silent by his respect for the magistrate, and his silence therefore raised no fair inference of his assent. In the same way, if a person, after having received a letter asserting that he had made a promise of marriage or accusing him of having committed a crime, should never send any reply to the letter, this inaction will be no proof that he admitted the promise or the accusation, and consequently will not enable his opponent to put in the letter as evidence against him². Yet it would be different in the case of any letter—such as a mercantile one—which it would be the ordinary course of business to contradict at once, if the recipient dissented from the statements it contained. So the fact that, to a letter which contained a statement of accounts, no reply was sent, is some evidence of the correctness of those accounts; though weaker than silence when *spoken to* about them (14 Q. B. 664). In like manner, when papers are found in a person's possession, even though they were not written *by* but *to* him, they may be evidence against him. For his conduct in having preserved them affords some evidence that the contents of them had reached his knowledge; and also some (though weaker) evidence that he approved of them.

It must be remembered (see p. 355) that when an admission is given in evidence against a party, he can demand that the whole statement, and not merely the inculpatory part, shall be brought out. And if this statement was qualified or explained by any other statement made at the same time, or if it referred expressly or impliedly to any previous statement,

¹ *Reg. v. Gilligan*, 3 Crawford and Dix 175; cf. *Child v. Grace*, 2 C. and P. 193. See p. 395 *infra* as to its admissibility as a "Dying Declaration."

² *Wiedemann v. Walpole*, L. R. [1891] 2 Q. B. 534. Cf. L. R. [1921] 1 K. B. 22; a letter taxing the recipient with paternity of a child.

such statements may be incorporated with the inculpatory statement. But this rule as to taking the whole of an admission has no application to warrants of arrest; for they are not admissions, *i.e.* statements of what *has been* done, but of what is directed *to be* done.

(2) When in examination-in-chief a witness has said, "In consequence of what I heard or read, I did so and so," the cross-examiner will be entitled (though the party calling the witness was not) to ask what the witness heard, or to call for the document which he read. For otherwise the witness's evidence would be left incomplete.

Thus if, on *A*'s trial for murdering *B*, *A* supports his defence of suicide by evidence of *B*'s saying "I have taken poison," the Crown can elicit by cross-examination the remaining words "which *A* sent me." A re-examiner may similarly supplement a cross-examination (*cf.* p. 355).

(3) A man's bodily sensations, or his state of mind, may be proved by narrating the description he gave to the witness, provided that he gave it simultaneously with the feeling. *E.g.* telling a doctor "I have a pain *here*"; or Lord St Leonard's declaration, p. 368 n., as to legacies he meant to insert in his will; but probably not his subsequent statements as to what he had inserted—a matter of Fact, not of Intention.

Four other exceptions arise in cases of Death.

(4) Thus, one exception is, that in questions of Pedigree, evidence is allowed to be given of statements that were made, before any dispute arose, by deceased members of the family, as to births, marriages, or deaths (or the dates when these events occurred), or as to relationships. The deceased person must have been an actual member of the family, not a mere servant or friend¹. And he must have made his statement before any dispute on the matter had arisen, as that might have tainted him with some bias. But he need not

¹ But in conveyancing the statutory declaration of a stranger is readily accepted, even in his lifetime, to establish matters of pedigree.

have spoken from personal knowledge of the fact he narrated; family tradition is sufficient.

The introduction of this exception is due to the difficulty of obtaining any first-hand evidence of events after intervals of time so long as those over which disputed genealogies often extend. It is, however (for no very obvious reason), restricted to cases strictly genealogical; so that if a defendant, sued for the price of jewellery, sets up a plea of Infancy, he cannot support it by merely proving what his deceased mother said as to the date when he was born (*Figg v. Wedderburne*, 6 Jurist 218).

(5) A similar exception is recognised in regard to disputes as to Public Rights, which may concern all the King's subjects (*e.g.* the existence of a highway), and even as to General Rights, which concern only some large class of people (*e.g.* the customs of a manor, or the boundaries of a parish). For in all such cases—unlike disputes as to a private right of way or the boundaries of a private person's estate—evidence of mere Repute is admissible. And it may be given even by narrating statements that were made (whether orally or in writing) before any dispute arose, by deceased persons who were likely to have a competent knowledge of the subject¹. But such statements can only be given in evidence so far as they do relate to current Repute. They cannot be adduced to shew any particular facts that would bear on the question², *e.g.* the fact of the deceased person's having seen boys whipped or cakes distributed at a particular place, by some person who wished thereby to commemorate its being a parish-boundary.

(6) Declarations made by a person, now deceased, against his pecuniary or proprietary interest are admissible. Thus a declaration of a deceased person as to the terms of his tenancy of a house has been admitted as sufficient both to rebut the

¹ *E.g.* "X, who died twenty years ago, used to say that no one dared lock the gate of that road."

² *Rex v. Bliss*, 7 A. and E. 550.

presumption of law (*supra*, p. 333) that the person in possession of real property holds it in fee simple, and also to establish the actual amount of rent which the deceased paid¹. And when any such declaration is admitted, all details which form part of the same statement will be admitted, even though they were in no way against the deceased man's interests². Thus the fact of a life estate having been surrendered has been proved by the entry in a deceased solicitor's ledger of his having been paid for carrying out the surrender; and the date of a child's birth by a similar entry, in the accoucheur's accounts, of the payment of his fee for his attendance³. This class of evidence usually takes the form of written entries made by the deceased; but it is none the less admissible if the declaration were oral (27 T. L. R. 202).

Since this principle only admits declarations against the pecuniary or proprietary interests of the deceased man, his declaration that he—and not the suspected persons—committed a crime, would not be admissible on behalf of those persons should they be indicted for that crime⁴.

(7) A similar privilege is extended to statements (whether written or oral) made by a person, now deceased, in the discharge of a *duty* (mere habit does not suffice) which he owed to an employer, in the ordinary course of his employment⁵; even though they may be actually in favour of his own interests. Thus the fact that a man was served with a writ may be proved by the indorsement made on it by the deceased clerk who served it⁶, and the note entered by a deceased drayman, in a book kept for that purpose, of having made delivery of certain goods is evidence that those goods were so delivered⁷. But, as the mere routine of business

¹ *Reg. v. Churchwardens of Birmingham*, 1 B. and S. 763 (K. S. C. 512).

² *Warren v. Greenville*, 2 Strange 1129 (K. S. C. 511).

³ *Higham v. Ridgway*, 1 East 109.

⁴ 11 Cl. and F. at p. 112.

⁵ *Reg. v. Buckley*, 13 Cox 293; a case of oral statement.

⁶ *Poole v. Dicus*, 1 Bing. (N. C.) 649 (K. S. C. 514).

⁷ *Price v. Earl of Torrington*, 1 Salk. 283 (K. S. C. 514).

affords a less effective guarantee for accuracy than does self-interest, this privilege is restricted by limitations that were not imposed upon the one which we last explained. Thus a statement is not rendered admissible by having been made in the course of employment, unless it was made at the time of the occurrence to which it relates—*i.e.* within so few hours of it as to be practically a part of the transaction (29 T. L. R. 28). Moreover the admission of such a statement will be limited strictly to its mention of those circumstances which were essential to the performance of the duty; and will not, as in the case of a statement made against interest, cover the collateral details which may have been added. A third limitation is that it must record, not mere hearsay but, the personal knowledge of the person recording¹.

Rule VIII. The judges of the eighteenth century went far in excluding the testimony of witnesses who seemed to them to be likely, from personal interest in the case or other causes, to give but untrustworthy evidence. But a reaction was initiated by Jeremy Bentham. He pointed out that even the stupidest jurymen are on the alert to suspect bias in a witness; and moreover that from every witness's evidence, whether true or false, instructive inferences may be drawn—the very fact that he thinks it worth while to lie being itself a suggestive one. The influence of Bentham has brought about legislative reforms which have removed almost all objections to the competency of witnesses on the ground of Bias² or of Character; it being left to the jury to take account

¹ Cf. *Ryan v. Ryan*, 25 Irish L. R. 185. Here a deceased Irish priest had had—unlike Anglican clergymen—the duty, when registering a baptism, of stating if the child had been born in wedlock. He had therefore recorded it as child of “J. H. and H. F. *his wife*.” The register, though evidence of the baptism, was held not to be evidence of the wife-hood; for it was not shewn that he had “personal knowledge” of the wedding ceremony.

² In 1843, Lord Denman's Act made mere interest cease to be a disqualification; and in 1846 and 1851 Lord Brougham's Acts qualified even the parties to a suit to give evidence.

of these considerations when deciding upon the value of their testimony.

But an adequate degree of *Understanding* is, of course, necessary in a witness; and, on the ground of want of understanding, children or insane persons may be excluded if the judge finds, on investigation, that they are incapable of comprehending the facts about which they are to testify. Yet a lunatic is not necessarily incompetent to give evidence¹. The arbitrary rule treating children under seven years of age as necessarily too young for criminal Liability has, however, no counterpart in the law of Evidence, it being now settled that competency depends not upon the precise age but upon the actual intelligence of the witness².

The value added to testimony by its being given under supernatural sanctions is frequently so great that the law formerly made it essential to the competency of every witness that he should know and accept the religious obligation of an *Oath*. (Increased intercourse with the East led in the seventeenth century to the recognition of Muhammadans, and in the eighteenth to that of Hindus, as satisfying this condition, and being entitled to be sworn with their own sacred ceremonies.) But now, even in the case of adult witnesses, the requirement is no longer universal; for, by the Oaths Act, 1888³, "Every person objecting to be sworn, on the ground either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation in all places and for all purposes

¹ *Reg. v. Hill*, 2 Den. 254. At Leeds Assizes on Dec. 2, 1914, in *Rex v. Firth*, before Shearman, J., an asylum attendant was convicted, on a lunatic's evidence, of assaulting her. It was ruled by the Supreme Court of the United States (107 U. S. 419), that it is for the judge, after hearing evidence as to the mental condition of the witness, to decide whether or not his insanity extends so far as to prevent "his giving a perfectly accurate and lucid statement as to what he has seen and heard." Cf. C. C. C. S. P. LII. 617.

² *Rex v. Brasier*, 1 Leach 199. Five is usually too young; 2 Cr. App. R. 283. In old days the minimum age was twelve; it now seems to be about six. But even at twelve corroboration is desirable; 19 Cr. App. R. 29.

³ 51 and 52 Vict. c. 46; replacing a more limited Act of 1869.

where an oath shall be required by law." And a "child of tender years," who has not yet learned the nature of an oath may in criminal cases give evidence unsworn¹, if it is of sufficient intelligence and "understands the duty of speaking the truth." But the accused is not to be convicted on such evidence unless it be corroborated by material evidence which implicates him (cf. p. 398).

Rule IX. There are some questions which it is quite legal to ask, but which a witness may, if he think fit, equally legally refuse to answer. Such a privilege arises, for instance, in the following cases:

(1) A witness cannot be compelled to answer any question, or produce any document², which tends to criminate him³. He must pledge his oath that his answer would have this effect; and it will then be for the Court to decide whether the question seems to be one which, under all the circumstances of the case, it would really endanger the witness to answer. For a merely remote possibility of criminal prosecution⁴ will not be regarded as sufficient to entitle a witness to withhold information⁵. Yet even a man who has already been tried for an offence and been acquitted may still be in risk of criminating himself in connexion with the very same crime, *e.g.* by admitting his having been an accessory after the fact.

¹ 4 and 5 Geo. V. c. 58, s. 28 (2). In *Rex v. Wilson* the C. C. A. (July 14, 1924) recognised that the judge has still a right to question a boy of thirteen as to his religious belief and practice; even at the end of his evidence.

² *E.g.* the bill of sale whereby he disposed of an armed ship to a belligerent. But his refusal lets in secondary evidence; 2 E. and B. 940; *supra*, p. 369.

³ "One of the most sacred principles of the law of this country"; Lord Eldon (Buck, 540). But a prisoner *giving evidence* on his own trial has no privilege against criminating himself as to *that* accusation; p. 408 (3a).

⁴ *Rex v. Boyes*, 1 B. and S. 311 (K. S. C. 535).

⁵ By 24 and 25 Vict. c. 96, s. 85, in a few peculiar offences of Misappropriation, *e.g.* by agents, custodians, directors, etc. (*supra*, p. 237), a witness has no privilege in any *civil* court against criminating himself in respect of such an offence; but he is exempted from prosecution for it if he "first disclosed" it when thus under compulsory examination. See also 6 and 7 Geo. V. c. 50, s. 43. Cf. 4 and 5 Geo. V. c. 59, s. 166, as to compulsory admissions in bankruptcy.

(2) A witness cannot be compelled to produce his title deeds for inspection. If however he is himself a party to the particular litigation, he does not enjoy this privilege; except for deeds that are irrelevant to his opponent's case.

(8) A husband or wife cannot be compelled to disclose any communications made to him or her, during the coverture, by his or her wife or husband. This rule is based on the importance of preserving the confidences of married life.

(4) Counsel and solicitors cannot be compelled—and indeed are not even permitted—to disclose facts confided to them by¹ or on behalf² of a client, or to produce any documents received by them from a client in their professional capacity, unless the client consents to waive this privilege; for it is his, and not theirs. No such protection, however, exists if the adviser was being consulted, not merely in order to protect his client against the results of a past criminal act, but to facilitate the commission of some future one. Nor does the privilege cover facts merely collateral to the confidence, *e.g.* that he saw his client sign the perjured affidavit (Cowper 845).

There is no similar privilege³ for confidences entrusted to a medical⁴ or even to a clerical adviser⁵; nor for business secrets (*e.g.* the secret marks upon bank-notes).

(5) By a still stricter rule, one of Exclusion rather than of Privilege, a witness cannot be compelled, and indeed will

¹ *Rex v. Withers*, 2 Camp. 578 (K. S. C. 534). But a third party, who overheard the confidence, has no such privilege.

² *E.g.* the statements made to them by a witness as to what evidence he can give in a litigation contemplated, even though not yet commenced. Such statements are taken down in writing (and often then signed by the witness); his "proof."

³ Nor even an exemption from the—theoretical—law of Misprision (*supra*, p. 279).

⁴ But any other disclosure of those confidences would be an actionable breach of the doctor's obligation to secrecy.

⁵ *Rex v. Gibbons*, 1 C. and P. 97 (K. S. C. 524); cf. L. R. 17 Ch. D. at p. 681. Yet see Phillimore's *Ecclesiastical Law*, p. 704.

not be permitted¹, to answer any question which involves a disclosure of any official communications (whether written or oral) which are such that—in the opinion of the judge—disclosure of them would be contrary to public policy². Hence in the case of prosecutions so important as to have been (not merely nominally but actually) instituted by the executive government, the name of the informer need not be disclosed by a witness, nor can he be asked if he were himself the informer³. But it would seem that this rule does not extend to the case of communications made to a private prosecutor, even where the prosecution is practically in the hands of the police; all that can be done is to postpone the question until the course of the trial may make manifest its importance.

Where any of these privileges is waived by a person who is at liberty to waive it, the answer he gives will be perfectly good evidence, even against himself; both in the proceedings in which it is given and in any subsequent litigation. But if, on the other hand, he claims his privilege, and yet is illegally compelled to answer, his answer will not be evidence against him as an admission, either then or in any subsequent litigation. Yet against other parties it is evidence (since the privilege is only his and not theirs); and consequently, if he were not himself a party to the particular litigation, the validity of the trial will not be affected by the reception of his answer.

Rule X. Where a document is tendered as evidence the necessary proof of its genuineness varies with its age.

(1) If the document be less than thirty years old, express evidence of its genuineness must be adduced⁴. In ordinary cases, it is not necessary to do more than to shew that the

¹ *Rex v. Hardy*, 24 St. Tr. at pp. 818, 820. The exclusion will not let secondary evidence in, as it does in other cases of Privilege.

² *E.g.* a captain's report to the Admiralty about a naval collision.

³ *Marks v. Beyfus*, L. R. 25 Q. B. D. 494. As to reports made to a Superintendent of Police by his constables, see 65 J. P. 209.

⁴ But conveyancers do not require any such proof on a sale of real property, even for recent documents; the genuineness being sufficiently corroborated by the fact that the vendor is in possession of the property.

document or the signature to it is in the handwriting of the person by whom it purports to have been executed. Handwriting may be proved by any witness who from knowing the person's handwriting can swear to the genuineness of the document; or under a modern statute¹, even by merely letting the jury compare the document in question "with any writing proved, to the satisfaction of the judge, to be genuine," *e.g.* a signature made by the person whilst actually in the witness-box before them.

But there are some instruments to whose validity some further circumstance is essential; and in such cases, that circumstance must also be proved. Thus where attestation by witnesses is essential to the document (as in the case of a bill of sale) it must be shewn to have been duly attested. To establish this fact one of those witnesses must, if possible, be produced. But if none of the attesting witnesses can be found, the handwriting of one of them must be proved; and some evidence must be given as to the identity of the person who actually executed the instrument with the person who is under discussion in the litigation, unless the attestation clause itself sufficiently identifies him. Again, in the case of deeds the further ceremony of sealing² is necessary; but where there is an attestation clause the courts will, if the signature be proved, accept this clause as sufficient evidence of the sealing and delivery³.

(2) In the case of documents more than thirty years old, just as in questions of pedigree (*supra*, p. 379), the law of evidence is relaxed to meet the difficulties produced by the lapse of time⁴. Such documents, if produced from a proper

¹ 17 and 18 Vict. c. 125, s. 27; extended to criminal cases by 28 and 29 Vict. c. 18, s. 8.

² Any act suffices by which the party adopts the affixed seal.

³ *In re Sandilands*, L. R. 6 C. P. 411. Cf. 7 Taunt. 253.

⁴ "Time with his scythe is ever mowing down the evidences of title; wherefore the law places in his other hand an hour-glass by which he metes out periods of duration that shall supply the place of the muniments his scythe has destroyed" (Lord Plunket).

custody, "prove themselves," *i.e.* no express evidence of their genuineness need be adduced. Nor is it necessary that the custody from which such instruments come should be the most proper custody for them to be in. It is sufficient that the custody, though not the best, is a natural one, *i.e.* one which, under the circumstances of the particular case, appears to the judge to be one naturally consistent with the genuineness of the document. Thus, although papers relating to an episcopal see properly pass on the death of one bishop to his successor in office, yet an ancient document would be allowed to "prove itself," if it were produced from the custody of a deceased bishop's descendants¹.

¹ *Meath v. Winchester*, 3 Bing. (N. C.) 183.

CHAPTER XXVI

RULES OF EVIDENCE PECULIAR TO CRIMINAL LAW

IN criminal cases the general principles of Evidence are supplemented by some rules, and modified by others, which do not hold good in civil litigation. Of these the following deserve explanation here.

Rule I. A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature¹.

Even in the latter case, *e.g.* in actions of debt, a mere scintilla of evidence would not warrant the jury in finding a verdict for the plaintiff; for there must (as we have seen²) be so much evidence that a reasonable man might accept it as establishing the issue. But in criminal cases the presumption of innocence is still stronger³, and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof⁴. The progressive increase in the difficulty of proof as the gravity of the accusation to be proved increases, is vividly illustrated in Lord Brougham's memorable words in his defence of Queen Caroline: "The evidence before us," he said, "is inadequate even to prove a debt—impotent to deprive of a civil right—ridiculous for convicting of the pettiest offence—scandalous if brought forward to support a charge of any grave character—monstrous if to ruin the honour of an English Queen⁵."

¹ "It is not enough that Justice should be morally certain. She must be immorally certain—that is, certain *legally*" (Charles Dickens).*

² *Supra*, p. 349; cf. 13 C. B. (N. S.) 916.

³ *Supra*, p. 330.

⁴ The practical working of this is well shewn by the fact that whereas the average percentage of convictions on criminal indictments in general is about eighty, it is little more than fifty per cent. on indictments for murder (even after deducting the cases in which insanity is proved). ⁵ *Speeches*, i. 227.

It was formerly considered that this higher minimum was required on account of the peculiarities of criminal procedure, such, for instance, as the impossibility of a new trial, and (in those times) the refusal to allow felons to be defended by counsel and to allow any prisoners to give evidence; and consequently that it was required only in criminal tribunals. This view is still taken in America; but in England it was more usually considered that the rule is founded on the very nature of the issue, and therefore applies without distinction of tribunal¹; *e.g.* if arson be the defence to an action on a fire-policy, or forgery to one on a promissory note; see Stephen's *Dig. Ev.* art. 94, Taylor's *Evidence*, § 112. But the American view was taken by Lush, J. (L.R. [1917] 1 K.B. at p. 357); and is taken by Mr Phipson (*Evidence*, p. 10). Cf. 10 Moo. P.C. 502.

History shews how necessary is some such rule, emphatic and universal, in order to protect prisoners from the credulity which the shifting currents of prejudice will inspire about any offence, or class of offences, that may for the moment have aroused popular indignation. No less enlightened a jurist than Bodin maintained, in an elaborate treatise², that persons accused of witchcraft ought to be convicted without further proof, unless they could demonstrate themselves to be innocent—"for to adhere, in a trial for witchcraft, to ordinary rules of procedure, would result in defeating the law of both God and man³."

Whenever, therefore, an allegation of crime is made, it is the duty of the jury—to borrow Lord Kenyon's homely phrase—"if the scales of evidence hang anything like even, to throw into them some grains of mercy"; or, as it is more commonly put, to give the prisoner the benefit of any reason-

¹ But see p. 330 n. *supra*. ² *Démonomanie*, ed. 1598; bk. iv. ch. iv.

³ Similarly when in 1899 Esterhazy confessed in the *Observer* newspaper that he had forged the famous "bordereau," in order that the suspicions against Capt. Dreyfus might be eked out by some item of actual evidence, he justified himself by the plea that "on the trial of Spies, it is always necessary to forge some documentary evidence [fabriquer des preuves matérielles], or no spy would ever be convicted."

able doubt. Not, be it noted, of every doubt, but only of a doubt for which reasons can be given; for everything relative to human affairs and dependent on human evidence is open to some possible or imaginary doubts. "It is the condition of mind which exists when the jurors cannot say that they feel an abiding conviction, a moral certainty, of the truth of the charge. For it is not sufficient for the prosecutor to establish a probability, even though a strong one according to the doctrine of chances; he must establish the fact to a moral certainty¹—a certainty that convinces the understanding, satisfies the reason, and directs the judgment. But were the law to go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether²." As was said by Cockburn, C.J., in the *Tichborne Case*, "It must not be the mere doubt of a vacillating mind that has not the moral courage to decide upon a difficult and complicated question, and therefore takes shelter in an idle scepticism." Or as the same truth was expressed by a great Irish judge, "To warrant an acquittal the doubt must not be light or capricious, such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as, upon a calm view of the whole evidence, a rational understanding will suggest to an honest heart; the conscientious hesitation of minds that are not influenced by party, preoccupied by prejudice, or subdued by fear³."

Accordingly, a verdict of acquittal does not necessarily mean that the jury are satisfied of the prisoner's innocence⁴; it states no more than that they do not regard the evidence as legally sufficient to establish his guilt⁵. There is therefore a fallacy in the old forensic argument of prosecutors, "you

¹ See 13 Cr. App. R. 211 for a case of "the very gravest suspicion" yet not beyond reasonable doubt.

² *Per Shaw, C.J.*, on the trial of Prof. Webster (*supra*, p. 345), 5 Cushing.

³ Kendal Bushe, C.J., *Dublin Univ. Mag.* xviii. 85. ⁴ *Supra*, p. 350.

⁵ Moreover "the acquittal of the whole offence is not an acquittal of every part of it, but only an acquittal of it as a *whole*"; Pollock, L.C.B. (C. C. C. Sess. Pap. XLVI. 886).

must convict the prisoner unless you think my witnesses ought to be convicted of perjury." For the jury may well be in utter doubt as to the soundness of either alternative.

This abstract, and therefore necessarily vague, direction—that they must be satisfied "beyond reasonable doubt"—is the only restriction which, in ordinary cases, English criminal law imposes upon the discretion of juries in pronouncing upon the sufficiency of evidence¹. The civil and the canon law, on the other hand (like the Mosaic², the Roman³, and the modern Scottish⁴), required at least two witnesses⁵, and, from the frequent difficulty of obtaining these, had to fall back upon confessions extorted by torture. The English common law, by avoiding the unreasonable rule, escaped the cruel consequence⁶.

The cases are rare indeed in which English law exacts any defined minimum of proof for even a criminal charge⁷. But the following are important ones.

¹ *Rex v. Nash* (6 Cr. App. R. 225) deserves study as a case where there was just enough circumstantial evidence to support a conviction for murder.

² Deut. xix. 15.

³ *Testis unus, testis nullus.*

⁴ 6 Justiciary Rep. 128.

⁵ See Ayliffe's *Parergon*, p. 541. In some cases indeed (see Best on Evidence, p. 81) the canon law exacted far higher degrees of proof; as when it provided that no cardinal was to be convicted of unchastity unless there were at least seven—or in Fortescue's time, according to him (*De Laudibus*, c. 32), twelve—witnesses. This requirement was rendered the harder to comply with by the further rule of canon law, that in criminal cases a woman could not be a witness. The result may well have been the same as was produced by the similar rule of the Koran, requiring all accusations of adultery to be supported by four eye-witnesses; namely, that (according to Sir William Muir) "the threat of punishment became almost inoperative." For by introducing artificial rules of proof into the law of evidence it is easy to effect a modification of the substantive law, whilst appearing to modify merely the adjective law; the disguise being closely akin to that under which the *Prætores Urbani* succeeded in surreptitiously reforming the laws of Rome (Maine's *Ancient Law*, ch. III.).

⁶ Pollock and Maitland, II. 657.

⁷ Only in two instances is corroboration required by statute in civil courts; viz. in bastardy proceedings and in actions for breach of promise of marriage. As to Divorce, see L. R. [1907] p. 334; and p. 394 *infra*. Claims against a dead man's estate are viewed jealously if the claimant is not corroborated (L. R. 31 Ch. D. 1 and 117).

(1) In treason and in misprision of treason, it is provided by statute¹ that a prisoner is not to be convicted except upon the evidence of two lawful witnesses, deposing either to the same overt act or at least to separate overt acts of the same kind of treason; or upon his own voluntary confession in open court. To secure the benefit of this rule the oath by which persons were admitted, in Ireland, into the Fenian society was always administered by a single one of its members, with no third person present.

(2) Upon an indictment for perjury or subornation of perjury, or for any of the cognate offences created by the Perjury Act, 1911 (though the taking of the oath, or the giving of the false evidence, may be proved by one witness), the falsity of that evidence itself cannot be legally established merely by the testimony of one witness²; for that would be only oath against oath. On each "assignment" of perjury the contradicting witness must be corroborated; and on some material point. The question as to whether a point is sufficiently material is for the judge, not the jury, to decide. It is not necessary that the corroborating fact should be so important that from it, standing alone, the falsity of the perjured statement could have been inferred. The corroboration may be by a second witness, or documentary evidence, or an admission by the prisoner³, or some other similar circumstance⁴. But merely to shew that the supposed perjurer has made statements directly contradictory of each other (even though both of them were made on oath)⁵ will not suffice. For this leaves it still utterly uncertain which of the two statements was the

¹ 1 Edw. VI. c. 12, s. 22; modified by 7 and 8 Wm. III. c. 3, s. 2; *supra*, p. 277. But in most *treason-felonies* one witness suffices.

² 1 and 2 Geo. V. c. 6, s. 13 (the Perjury Act, 1911). See pp. 302-3 *supra*.

³ *Reg. v. Hook*, D. and B. 606 (K. S. C. 422). In some American cases, perjury has been proved without any witness, by a combination of two evidentiary documents; *e.g.* where both a letter written by the prisoner and an invoice written to and preserved by him, contradicted him as to the ownership of property. Such proof would probably be held sufficient in England also.

⁴ *Reg. v. Parker*, C. and M. 646.

⁵ *Rex v. Harris*, 5 B. and Ald. 926.

false one; and the indictment cannot be framed in a merely alternative form.

(3) Under the Criminal Law Amendment Act, 1885, it is provided in regard to certain offences against women and children that no person shall be convicted of these upon the evidence of one witness alone, unless such witness be corroborated in some material particular, and by evidence which implicates the accused.

(4) Similar corroboration is required in those cases in which under the Criminal Justice Administration Act, 1914 (*supra*, p. 383), a very young child is allowed to give evidence without being sworn¹. The precaution is wise; for a tribunal of adults is apt to place undue reliance upon these little people; forgetting that, though less fraudulent than adults, they are more imaginative. Hence the judge should caution the jury (18 Cr. App. R. 165). "Children are a most untrustworthy class of witnesses; for, as our common experience teaches us, they often, when of a tender age, mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and by desire for notoriety²." They are both "suggestionable" and even "auto-suggestionable."

(5) Where a witness was³ himself an Accomplice⁴ in the very crime⁵ to which the indictment relates, it is the duty of the judge to caution the jury strongly as to the invariable danger of convicting upon such evidence without corroboration⁶.

¹ See p. 544 *infra*.

² Mr Inderwick, K.C.

³ In the opinion of the jury.

⁴ Even if merely as accessory *after* the fact.

⁵ But if *A* and *B* steal a horse, and *B* sells it to *C*, and *C* is tried for receiving, *A* would not need corroboration at *C*'s trial.

⁶ A like caution is given when a charge of *sexual* crime is supported by the complainant alone; 9 Cr. App. R. at p. 220; for there "corroboration, though not essential in law, is always required in practice," 18 Cr. App. R. 121. But if the judge has given the due caution, a conviction will be upheld; *Rex v. Crocker*, 17 Cr. App. R. 45; *Rex v. Jones*, 19 Cr. App. R. 40; cf. 18. 50, 65, 142.

Moreover this corroboration must confirm not merely a¹ material particular of the witness's story, but some particular which connects the prisoner himself² with it³. For, as the accomplice knows the whole history of the crime, he may tell a true tale, capable of thorough corroboration, and yet may easily insert in it the name of an innocent man, in place of one of the actual offenders. Hence it is not enough that an accomplice is corroborated as to the weather on the night of the burglary and the number of windows broken through⁴. And if there are two prisoners, and the accomplice's evidence is corroborated as regards one of them only, this will not suffice to dispense with the warning as regards the other.

Corroboration by another accomplice, or even by several accomplices⁵, does not suffice. But a spy, since his complicity extends only to the *actus reus* and not to the *mens rea*, is not truly an accomplice, and so does not need corroboration⁶.

But these common-law rules as to the necessity of corroborating accomplices amount (as we have said) only to a caution and not to a command⁷. Accordingly even in capital

¹ Not *every* material particular; for were it so there would never be any need for the accomplice's evidence.

² Hence in Affiliation proceedings the mere fact of Parturition is not corroboration enough.

³ *Rex v. Baskerville*, L. R. [1916] 2 K. B. 658. *E.g.* that at prisoner's house a knife was found, stamped with the same private house-address as was stamped on one which the burglar had dropped; C. C. C. Sess. Pap. CXLVII. 683. Or the prisoner's silence when accused may corroborate (14 Cr. App. R. 1); but contrast 19 Cr. App. R. 27. Cf. p. 375 *supra*.

⁴ So in the Divorce Court (where this sort of corroboration is always required for the evidence of private detectives) if such a detective says, "I saw respondent and co-respondent enter the hotel together, and I called this policeman's attention to it," it is no sufficient corroboration for the policeman to say merely, "He did shew me a man and a woman entering that hotel."

⁵ *Rex v. Gay*, 2 Cr. App. R. 327. "A jury is no more bound to believe two informers than one," said Whiteside, C. J. Cf. 15 Cr. App. R. 177.

⁶ *Rex v. Bickley*, 2 Cr. App. R. 53; *Reg. v. Mullins*, 7 St. Tr. (N. S.) 1111. Yet a man who has thus taken up falsehood as his trade must be peculiarly untrustworthy.

⁷ "Not a rule of law, a rule of prudence"; 12 Cr. App. R. 17. 45-6, 81; 13. 215; 14. 121. But where it is by *Statute* that corroboration is required, the case must be withdrawn from the jury if there be no corroboration.

cases verdicts of conviction, based solely on the uncorroborated evidence of an accomplice, have upon appeal been held good. And, even the urgency of the caution may vary according to the consistency of the accomplice's story, the extent of his complicity, and the heinousness of the crime. Thus the caution may be withheld altogether in cases where the charge implies so little moral guilt as not to taint a man's credibility at all; *e.g.* in the case of non-repair of a highway¹.

(6) The Motor Car Act, 1903, s. 9 (1), in making it an offence to exceed the speed of twenty miles an hour on any public highway, provides that no conviction for it is to take place "merely on the opinion of one witness" as to the rate of speed. But a single witness does suffice if he speaks, not to his mere "opinion," but to a Fact which he has ascertained by stop-watch and measured distance (70 J. P. 211).

Rule II. To the doctrine which excludes Hearsay evidence there are—besides the general exceptions which we mentioned along with it—some further ones which are peculiar to criminal cases. Three of these deserve careful consideration.

(1) The admission of the complaints made by victims of sexual offences; *supra*, p. 374.

(2) Upon an indictment for Homicide², the *dying declarations* of the slain man respecting the cause of his death are admitted under certain circumstances. This exception seems to have been fully recognised as early as 1697. At the Old Bailey, in that year, whilst it was held, in one trial for murder, that evidence could not be received as to the murdered man having said beforehand that he and the prisoner were going to fight a duel, yet in another, where a painter in Lincoln's Inn Fields was indicted for having killed two

¹ *Reg. v. Boyes*, 1 B. and S. 311 (K. S. C. 535).

² *Rex v. Mead*, 2 B. and C. 605 (K. S. C. 519). For this is the one crime where it is certain that the victim will be unable to be a witness at the trial of the man who wronged him.

bailiffs, their "dying words" were admitted as evidence against him¹. Such declarations are admitted because the religious awe inspired by the approach of death is deemed fully equal to the sanction of any judicial oath². Hence the rule has been held to be inapplicable to declarations made by a child of the age of four³. And, similarly, it will not apply unless the deceased thought his death quite imminent. It is not sufficient that he was "in fear of death⁴" or "thought he was going to die⁵." He must have felt nothing short of "a settled hopeless expectation of death⁶." If, however, he had thus abandoned all hope of recovery when he made the declaration, the fact that his medical attendants were not equally hopeless, or that he did actually survive for several days after making it, will not render the declaration inadmissible. The present tendency, however, is to reject dying declarations except in the clearest cases, testing them with "scrupulous and almost with superstitious care⁷." The declaration may even exculpate the prisoner, *e.g.* be a confession of suicide, intentional or accidental.

It should be carefully remembered that the rule is limited, not merely to trials for crime, but to trials for Homicide; and thus will not apply when the person who caused a death is under trial, not for it, but only for some earlier crime (perhaps an abortion or a violent robbery) of which the death was a result⁸.

(3) When a witness (whether for the prosecution⁹ or the defence¹⁰) has made a *Deposition* before the justice who sent

¹ Hargrave MSS. in British Museum, No. 146, p. 162.

² *Reg. v. Woodcock*, 1 Leach 502. "They are an exception to all rule; but they always produce the greatest effect"; Coleridge, J., in 1845.

³ Cf. *Reg. v. Jenkins*, L. R. 1 C. C. R. 187 (K. S. C. 515).

⁴ C. C. C. Sess. Pap. cxxvi. 841.

⁵ *Reg. v. Neill*, C. C. C. Sess. Pap. cxvi. 1417 (K. S. C. 483).

⁶ *Reg. v. Peele*, 2 F. and F. 21; *Reg. v. Gloster*, C. C. C. Sess. Pap. cviii. 647 (K. S. C. 518). "I think I am dying" was, after objection, held sufficient by Lush, J., in *Reg. v. Klaproth* (C. C. C., Feb. 21, 1921).

⁷ *Per Byles, J.*, in *Reg. v. Jenkins*, L. R. 1 C. C. R. 187 (K. S. C. 515).

⁸ *Reg. v. Hind*, Bell 253.

⁹ 11 and 12 Vict. c. 42, s. 17.

¹⁰ 30 and 31 Vict. c. 35, s. 3.

the case for trial, it may be used at the trial, instead of calling the witness himself, if he has died in the interval, or has become insane, or is too ill to travel, or is being kept away by, or on behalf of, the prisoner¹. But it is well to notice that if the witness has merely gone abroad, it cannot be used; except perhaps in misdemeanor, and even then only by consent of the opposite party.

A deposition must bear the signatures both of the witness and of at least one of the committing magistrates; but it is not necessary to call any evidence to prove their genuineness. If the witness refuse or be physically unable to sign it would appear that this signature may be dispensed with². When a deposition is put in as evidence, it must be proved (i) that the absence of the witness is due to one of the grave causes which we have mentioned; and that the prisoner³ (ii) was present when the witness gave the evidence which it embodies, and (iii) had an opportunity of cross-examining him⁴.

A witness's deposition will not be thus available as evidence at a trial, unless the offence for which the prisoner is being tried is substantially the same as—or arises out of the same set of circumstances as⁵—that for which he was committed.

Rule III. Evidence of the prisoner's *good character* is always admissible on his behalf in criminal courts. Yet evidence of his *bad character* is usually excluded there (p. 360 *supra*); and in civil proceedings all evidence of character is excluded⁶. Hence this exceptional admissibility is only

¹ *Rex v. Harrison*, 12 St. Tr. 833. Cf. *The Times*, March 7, 1855; and C. C. C. Sess. Pap. CVII. 581.

² *Rex v. Holloway*, 65 J. P. 712.

³ Facts (ii) and (iii) are often proved by a policeman whom the committing justice has bound over to prosecute. The Criminal Justice Act, 1925, s. 13 (3), will, from June 1st, 1926, allow them to be proved by a certificate from the committing justice or his clerk.

⁴ I have known a deposition excluded on the trial of a foreigner, because the witness to its admissibility, being ignorant of the foreign language, could not prove that the interpreter's words had really informed the prisoner of this opportunity.

⁵ *E.g.* a murder, and a wounding with intent to murder; 2 Cr. App. R. 257.

⁶ See p. 544 *infra*.

intelligible as a relic of the Anglo-Saxon exculpation by the oaths of compurgators (see Pollock and Maitland, II. 684).

But, ancient and well-established as is this rule, opinion has been considerably divided as to its exact scope. Is the "character," which the witnesses are thus allowed to describe, the disposition or the reputation of the accused person? In *Reg. v. Rowton* the Court for Crown Cases Reserved adopted, though only by a majority, the latter alternative¹. Accordingly, in strictness, no evidence ought to be given about the prisoner's disposition, and still less about any particular acts of his. The witness, therefore, to borrow Erskine's words², is not to say "what *A*, *B*, or *C* told him about the man's character, but what is the *general* opinion concerning him. For 'character' is the slow-spreading influence of opinion, arising from a man's deportment in society, and extending itself in one circle beyond another till it unites in one general opinion. That general opinion is allowed to be given in evidence."

But, as Lord Ellenborough long ago said, "No branch of evidence is so little attended to³"; and this strict rule of law is still constantly and humanely disregarded in practice. For the present conditions of busy life in crowded cities often render it impossible for a man's conduct to have been under the continuous observation of many persons for so long a time as would enable any "general opinion" about it to grow up. Even neighbours and customers of his know nothing about him beyond their personal experience. Yet a departure from the strict rule opens out an inconveniently wide field of inquiry. For a witness's individual opinion of his neighbour's disposition may have to be supported or tested by protracted consideration of the innumerable facts which led him to form it. But evidence of a man's general reputation affords terse and summary proof of his disposition. On the other hand, this briefer and more technically correct

¹ L. and C. 520 (K. S. C. 528); cf. 1 Cr. App. R. 213. American courts also adopt it.

² In his speech in defence of Hardy.

³ *Rex v. Jones*, 31 St. Tr. 310.

mode of proof has the disadvantage of excluding all evidence (such as perhaps might have been obtained from the very same witness who proves the good reputation) of a deep-rooted evil disposition that rendered the man utterly unworthy of the good reputation which he enjoyed.

Either method of proof, however, would admit that negative evidence which in practice is so frequent, "I never heard anything against him." Such negative testimony may be the best of all tributes to a man's disposition; for most men are little talked of until fault is found with them¹.

Evidence of good character is thus peculiar in its nature, as being a case in which the witness speaks as to other people's knowledge, instead of as to his own. And the forensic procedure in regard to it is also peculiar. For the opposite party has no right to make a speech in reply upon it; nor ought he even to cross-examine upon it, unless he knows that he can thereby elicit a definite charge against the prisoner, *e.g.* his having committed other similar offences. But evidence of good character even though obtained only by cross-examination of the Crown witnesses, or given by himself alone, can be rebutted by evidence of a bad reputation²; but not by evidence of bad disposition, still less of particular bad acts (except that it sometimes³ may be rebutted by evidence of previous convictions).

A defendant's counsel must not assert his client's good character unless he is going to call evidence of it. On the other hand, if he do not call any, the prosecution ought never to make any comment upon this omission.

The probative value of evidence to character must not be overrated⁴. It is not sufficient ground for disbelieving solid

¹ Cf. Cockburn, L.C.J., in *Reg. v. Rowton*, L. and C. 536 (K. S. C. 533).

² But such evidence is so rare that neither Cockburn, L.C.J., nor Coleridge, L.C.J., had ever seen it given (C. C. C. Sess. Pap. cxv. 170).

³ Under the following statutes: 7 and 8 Geo. IV. c. 28, s. 11; 6 and 7 Wm. IV. c. 111; 24 and 25 Vict. c. 96, s. 116; 24 and 25 Vict. c. 99, s. 37.

⁴ "If you feel a doubt, you are entitled to take character into account. But only if the evidence has left your mind in doubt should you give any weight to testimonies to character" (Avory, J., at C. C. C. 1922).

evidence of facts. Were it so, no one would be convicted; for every criminal had a good character until he lost it. But it may be of great importance where mistaken identity is the defence. Or again determining which of two inferences should be drawn from a fact; and consequently in all questions of *mens rea*, since they must always be matters of mere inference. It thus is very useful in cases where a man is found in possession of recently stolen goods. At a charity-bazaar at Lincoln, about 1900, when an alarm was raised that a purse had been stolen, the thief slipped it into the coat-pocket of a bishop who was present; but any suspicions that might have been aroused by its being found in this pocket were effectually rebutted by the episcopal character of the wearer. Yet, even for such purposes, evidence of good character is, by a curious paradox, of least avail where it is most needed; namely in offences of great heinousness. For “in any case of atrocious criminality the act is so much out of the ordinary course of things, that, if perpetrated, it must have been produced by motives not frequently operating on the human mind. Therefore evidence as to the character of a man’s habitual conduct in common circumstances will here become far inferior in efficacy to what it is in the case of accusations of a slighter guilt¹.”

After conviction, however, evidence of character will always be of great importance in determining what punishment should be inflicted on an offender.

Rule IV. In criminal proceedings Admissions, made by (or on behalf of) a party to the litigation, are received in evidence less readily than in civil cases.

In civil tribunals, any admissions which have been made by the plaintiff, or the defendant, or the duly authorised agent of either, can be given in evidence quite freely. But in criminal cases, the admissions of the prosecutor cannot, as

¹ *Per Shaw, C.J.*, at the trial of Prof. Webster; *supra*, p. 345. See a good review of the effect of evidence of Character in 13 Cr. App. R. 125.

such, be given in evidence; for, technically speaking, he is no party at all to the proceedings, they being brought in the name of the Crown itself. And even the admissions, or—to use the term commonly applied to full admissions of criminal guilt—the Confessions (*supra*, p. 375), made by the person accused are not allowed to be given in evidence unless it appears that they were quite voluntary¹. (Whether or not they were so is a question for the judge, not the jury, to decide².) Even though no circumstances raise any doubt as to the character of the confession, it is now held to be the duty of the prosecutor to bring evidence of its having been given voluntarily³.

For though a litigant's own admissions might at first sight well appear to be the most satisfactory of all forms of evidence—and indeed were so regarded in the civil and the canon law⁴—experience has now shewn them to be open, especially in serious criminal charges, to two serious hazards of error. For (i) eagerness to secure the punishment of a hateful offence may lead a witness to exaggerate, even unconsciously, what was said to him by the person accused; and (ii) eagerness to propitiate those in authority may lead

¹ A similar doctrine prevails in the United States. Yet many scandals do arise there from the police putting arrested persons through "the Third Degree" by protracted questioning (*e.g.* 9 p.m. to 4 a.m.), or withholding of water, or even blows; cf. the "Sweat-box Case," *The State v. Ammons* (80 Mississippi 592). The Supreme Court rebuked these practices in December, 1924. Yet in 1925, in New Jersey, Harrison Noel, arrested for murder, was questioned by the police for eleven hours, and then, after two hours of sleep, for ten hours; *i.e.* for twenty-one hours out of twenty-three. He then made a confession. Of what value?

² *Reg. v. Warringham*, 2 Den. at p. 448.

³ *Ibrahim v. Rex*; L. R. [1914] A. C. 599.

⁴ Lord Stowell said: "A confession generally ranks highest in the scale of evidence;...it is taken as indubitable truth,...a demonstration, unless indirect motives can be assigned to it" (2 Hag. Con. 316). But now the Divorce Court will not act upon an uncorroborated confession except "with the utmost circumspection and caution" (L. R. 1 P. and D. 29). It may be due to morbid self-deception; or to a desire for divorce; or even to mere craving for notoriety. Cf. L. R. [1907], P. 334; and 27 T. L. R. 9.

the accused person himself to make untrue admissions¹; and (iii) he often means guilty only of the act, not of the evil intent. Hence English criminal lawyers have long² recognised that "hasty confessions are the weakest and most suspicious of all evidence³."

The rule may be stated thus: a confession must be excluded if it was made (i) in consequence of (ii) any inducement (iii) that was of a temporal character and (iv) connected with this accusation, and (v) that was held out to the accused by a person who had some authority over the accusation.

(i) *In consequence of.* The confession will only be inadmissible if it was due to the inducement. Where therefore the inducement has been deprived of all influence, as by lapse of time or by some intervening warning (*e.g.* a magistrate's statutory caution), the confession will stand.

(ii) *An inducement.* It is not necessary that the prisoner should have been pressed to confess guilt; it is sufficient if he were pressed to say anything whatever. Thus, "It might be better for you to tell the truth and not a lie⁴," will suffice to exclude a confession; although "Speak the truth *if you speak at all*," is harmless.

¹ A desire to shield an accused friend often leads convicts under sentence for some other offence, knowing that they are not likely to be again prosecuted, to make false confessions of having committed the crime which he is accused of.

² The (now) indubitable falsity of the confessions made by many persons who suffered death for witchcraft, has done much to bring about this change in the legal estimate of the probative value of such evidence. Mr Inderwick (*Side-Lights on the Stuarts*, p. 164), cites two instances of women who confessed, although they declared privately that their confessions were false; their motive being an actual desire to be put to death, in order to escape the obloquy under which they lived.

³ Sir Michael Foster's *Crown Law*, p. 234. Yet in French law, great importance is still attached to them. Thus on the prosecution of the Abbé Auriol, in 1881, for the murder of two of his parishioners, when the questions of the examining magistrate failed to elicit from him any incriminating admission, the Abbé was shut up in complete isolation for thirty-seven days. On the thirty-seventh he at last made a full confession. See H. B. Irving's *Studies of French Criminals*.

⁴ *Reg. v. Bate*, 11 Cox 686.

It is immaterial whether the inducement consisted in a threat of evil or in a promise of good¹. Thus the admonitions, "Tell the truth, or I'll send for the police," and, "Tell the truth and it will be better for you," are equally objectionable; and either inducement will be fatal to the admissibility of any confession which it may elicit. Although at one time the courts were ingenious² in so construing colourless words as to detect a hint of some inducement, it is now clear that the words of any alleged inducement must be construed only in their natural and obvious meaning³.

(iii) *Temporal*. An inducement will not exclude confessions produced by it, unless it were of a temporal character. To urge that it is a moral or religious duty to speak out, is not likely to cause a man to say what is untrue; and therefore will not affect the admissibility of what he says. Hence where a prisoner had been urged by the prosecutor to tell the truth "so that if you have committed a fault, you may not add to it by stating what is untrue¹"—and similarly where the mother of one of two boys said to them, "You had better, *as good boys*, tell the truth⁴"—the confessions which ensued were received as legal evidence.

(iv) *Connected with the accusation*. If the inducement had no bearing upon the legal proceedings connected with the accusation, it will not exclude the confession. Thus a confession was admitted in spite of its having been obtained by the promise, "If you will tell where the property is, you shall see your wife⁵." And if even an objectionable inducement

¹ *Reg. v. Jarvis*, L. R. 1 C. C. R. 96 (K. S. C. 525).

² Cf. 8 C. and P. 140; and 2 M. and R. 514. ³ *Reg. v. Baldry*, 2 Den. 430.

⁴ *Reg. v. Reeve*, L. R. 1 C. C. R. 362. Similarly the exhortation—"With the profession you make of being a Christian, it is only right for you to clear the innocent ones," has been held not to exclude the consequent confession (*Reg. v. Peters*, C. C. C. Sess. Pap. CXXVII. 209). Cf. *Rex v. Stanton*, 6 Cr. App. R. 198.

⁵ *Rex v. Lloyd*, 6 C. and P. 693 (K. S. C. 527). The decision that "Tell and you shall have some gin" will exclude a confession, is a ruling of very little authority; see Russell on Crimes, p. 2021 n.

to confess one crime should produce also a confession of some second and unsuspected offence, such confession will be admissible upon a trial that is only for the latter crime.

(v) *By a person in authority.* A person in authority means one who had some opportunity of influencing the course of the prosecution¹; e.g. a magistrate or a constable², or even a private person if he is prosecuting or is likely to prosecute. Thus if an accusation be made against a servant, and she make a confession to her master or mistress in consequence of some inducement held out by him or her, it would be excluded if the charge were one of stealing their property; whilst if it were a charge of killing her own child, they would have no such "authority" in the matter as to give any disabling effect to the inducement³. It is sufficient if the person in authority is present, silently acquiescing, when some third party spontaneously holds out the inducement.

But the mere fact that it was to a constable (or other person in official authority) that a confession was made, will not cause it to be rejected, when no inducement was held out. And this will be so even if no preliminary warning had been given to the accused who made it; and even though he made it in answer to questions put to him by this person in authority. "To innocent people it is a most valuable safeguard to have an opportunity of knowing and answering the charge⁴." But questions thus asked are viewed jealously by the judges; and in 1918 they formulated instructions⁵ about them (26 Cox 230).

¹ *Rex v. Gibbons*, 1 C. and P. 97 (K. S. C. 524).

² A person who has the prisoner in custody, even though not a constable, is "in authority," e.g. a searcher of female prisoners. *Reg. v. Windsor*, 4 F. and F. 361.

³ *Reg. v. Moore*, 2 Den. 522.

⁴ *Per Lord Russell*, C.J., 62 J. P. 279.

⁵ These lay it down that "when a police-officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person, *whether suspected or not*, from whom he thinks that useful information can be obtained." Yet this questioning must not be hostile or oppressive. But "whenever a police-officer has made up his mind

Even, however, when English law regards a confession as being rendered inadmissible by some inducement, it does not exclude evidence of any *acts* that may have been performed along with, or in consequence of, the giving of this excluded confession; *e.g.* the surrender, or the discovery, of stolen property. Moreover it does not exclude confessions themselves when not obtained by an inducement, even though they may have been obtained by some underhand means; *e.g.* by intoxicating the prisoner¹, or by abusing his confidence (as by a gaoler appropriating a letter which he had promised the prisoner to put into the post²), or by artifice (as by falsely asserting that some of the prisoner's accomplices are already in custody³). In such cases, however, the judge will warn the jury not to attach to the confession too much weight.

A further difference between civil and criminal courts, in their treatment of admissions, concerns such admissions as are made by mere agents. In civil proceedings, wherever the acts of an agent will bind the principal his admissions will also bind him, if made in the same affair and at the same time, so as to constitute a part of the transaction⁴. But criminal law does not adopt this wide rule; it never holds a principal liable for admissions made by his agents except when he has authorised them expressly. Accordingly an

[cf. 18 Cr. App. R. 47] to charge a person with a crime, he should first caution such person before asking any (or any further) questions." Hence persons "in custody" should not be questioned—nor even be allowed to volunteer a statement—until after being cautioned. And when a voluntary statement is made, no questions must follow it "except for the purpose of removing ambiguity in what he has actually said." The usual caution (*infra*, p. 453) should be ended with "be given in evidence," omitting the deterrent words "against you." "After arresting, a constable"—said Lord Brampton—"should keep his mouth shut, but his ears open."

¹ *Rex v. Spilsbury*, 7 C. and P. 187.

² *Rex v. Derrington*, 2 C. and P. 418.

³ *Rex v. Burley*, 1 Phil. Ev. (7th ed.) 111.

⁴ See Story on Agency, ss. 134, 451. Thus, in an action against a railway company by a passenger for the loss of his luggage, the admissions of the station-master as to the way in which the loss took place, made by him the next day after the loss, in answer to inquiries for the luggage, are good evidence against the company; *Morse v. C. R. Railroad*, 6 Gray 450.

admission made by a prisoner will not be evidence against his accomplices in the crime, unless it had been expressly authorised by them¹. Yet, as we have seen (*supra*, p. 294), so soon as a common criminal purpose has been shewn, evidence of the *acts* of one accomplice, though done in the absence of the others, will be admissible against all of them.

Rule V. The principles relating to the Competency of witnesses are not identical in civil and in criminal courts.

We have already mentioned (*supra*, p. 383) the cases in which recent statutes have permitted evidence to be given in criminal proceedings by children who do not understand the nature of an oath, if they be sufficiently intelligent and be aware of the duty of speaking the truth. A converse and far more important peculiarity in the criminal rules of evidence is that by which (A) accused persons, and (B) the wives or husbands of accused persons, are entitled to refuse to give evidence (and, until very recently, were indeed entirely incompetent to give it).

(A) The common law disqualified every person who had an interest in the result of any legal proceeding—whether civil or criminal—from giving evidence in it. Hence, of course, the actual parties to that proceeding, since they had the strongest interest of all, were disqualified; plaintiffs and defendants in civil cases, and prisoners in criminal ones. (But the prosecutor in a criminal case could give evidence; for technically he is no party to the proceedings, the Crown being the *dominus litis*.) Prisoners, however, until early in the eighteenth century, were usually questioned (though not upon oath) by the judge himself, at the conclusion of the Crown evidence, in order to elicit their defences². And this

¹ *Reg. v. Swinnerton*, C. and M. 593. So, in the Divorce Court, a respondent's confession (which, even against herself, needs corroboration, see p. 401 n⁴), is no evidence against the co-respondent. An incriminating letter written by her to him, but lost in the post, will be no evidence against him (though it would be, had he received and preserved it; *vide supra*, p. 377).

² See *Harrison's Case* in 1692, 12 St. Tr. 159.

often was of great assistance to them; especially as no felon could then be defended by counsel. On the other hand, it gave wide scope for judicial cruelty, as was too often shewn by Lord Jeffreys and other judges in the Stuart period¹.

In civil cases the evidence of the parties was rendered admissible in 1851². Subsequently in 1872 there began a series of legislative enactments which enabled prisoners to give evidence in the case of a few particular crimes. The judicial experience of the working of these exceptional privileges proved so favourable that ultimately a general enactment was passed³—the Criminal Evidence Act, 1898.

By it:

1. The person charged is made a competent (but not compellable) witness for the defence⁴ at every stage of the proceedings⁵, whether he be charged solely, or jointly with some other person⁶. The judge should (73 J. P. 359) inform him of his right to give evidence. It is to be given from the box and not from the dock⁶.

2. (a) On committal for trial, he gives his evidence immediately after the magistrate has delivered the usual statutory caution as to the ultimate use that may be made against him of anything he may say.

¹ And by Page, J., even so late as 1741. See in *Tom Jones*, bk. viii. ch. xi., Fielding's vivid picture of Page's satirical questioning of a prisoner until "everybody fell a-laughing. It is indeed charming sport to hear trials upon life and death! But I own I thought it hard that there should be so many of them—my lord and the jury and the counsellors and the witnesses—all upon one poor man, and he too in chains. He was hanged; as, to be sure, it could be no otherwise."

² Lord Brougham's Act; 14 and 15 Vict. c. 99.

³ 61 and 62 Vict. c. 36. It does not extend to Ireland; s. 7 (1).

⁴ Not merely of himself, but of fellow prisoners also.

⁵ This does not include proceedings before the Grand Jury, for they have nothing to do with the defence. Nor can a prisoner, after pleading guilty or being convicted, give evidence on oath in mitigation of punishment, as there is then no "issue"; he can only, as at common law, make an unsworn statement. *Reg. v. Hodgkinson* (64 J. P. 808). If co-prisoners wish to give evidence, they give it in the order in which their names stand in the indictment.

⁶ See p. 544 *infra*.

(b) At trial, he gives it immediately after the Crown witnesses; unless he is going to call some witness¹ of his own (other than a mere witness to character). When he thus does not call a witness, the fact of his having himself given evidence creates no right of reply; so that, if he be undefended by counsel the Crown counsel will have no opportunity at all of commenting upon the evidence he gives.

3. He must not be cross-examined *to credit*; except

(α) as regards some offence which is such that evidence of its commission would intrinsically be admissible evidence for the prosecution (*e.g.* as bearing upon the question of *mens rea*) in the present proceedings²;

or (β) when he has put in³ evidence of his good character;

or (γ) when his defence is such as to assail the character of the prosecutor⁴, or of the prosecutor's witnesses⁵;

or (δ) when he has given evidence against a co-defendant⁶.

4. The prosecutor must not comment on the fact of a prisoner's having refused to give evidence⁷. But the court is not placed (as in the United States it is) under any such

¹ If he do call witnesses, his evidence usually comes *before* theirs.

² Thus a conviction against a schoolmaster, for an assault upon a scholar, was quashed because the defendant had been asked whether he had been previously convicted of a similar assault on another scholar; *Charnock v. Merchant*, L. R. [1900] 1 Q. B. 474. Had the previous assault been on the same scholar, the evidence would probably have been admissible.

³ But not when one of his witnesses has merely volunteered an eulogy of him, unasked; 17 Cr. App. R. 36.

⁴ A *living* prosecutor; *e.g.* not the murdered victim; 14 Cr. App. R. 87.

⁵ But not by merely denying, even violently, the truth of the evidence against him; 39 T. L. R. 457. Study *Rex v. Preston*, L. R. [1909] 1 K. B. 568, and *Rex v. Hudson*, L. R. [1912] 2 K. B. 465; the principle is vague. His answers to cross-examiners are no part of his "defence"; 3 Cr. App. 67.

⁶ He is liable to be cross-examined by (or by counsel for) any person tried along with him whom he has prejudiced by his evidence. But if questions be put to him for a co-prisoner whom his evidence has *not* prejudiced, this will give the Crown a right to a speech in reply as against that prisoner (*Reg. v. Paget*, 64 J. P. 281). Cross-examination by or for a co-prisoner should precede the Crown's cross-examination.

⁷ s. 1 (b).

restriction¹. Experience, however, seems to shew that juries now, without the help of any comment, readily draw for themselves a hostile inference from the prisoner's refusal. (Cf. 3 Cr. App. R. 232.)

Experience has already shewn that this statute, though so great a departure from what had been a fundamental principle in English criminal procedure, has worked admirably. Lord Brampton² found it "a danger to the guilty, but of the utmost importance to the innocent" (*Reminiscences*, ch. 46). We may add that there is also in force another statute which departs even further from the ancient principles; viz. the Evidence Act, 1877³. Under this, whenever criminal proceedings are taken merely to test or to enforce some *civil* right, the party charged is not only competent but even compellable to give evidence, and either for the defence or even for the prosecution.

The prisoner had at common law a right (at any rate when undefended by counsel⁴) to make a statement in his own defence without being sworn. And the Criminal Evidence Act, 1898, expressly provides⁵ that "nothing in this Act shall affect any right of the person charged to make a statement without being sworn." This proviso seems intended to operate even in the case of a prisoner who does give evidence on oath; enabling him (at any rate if undefended) to add to it an argumentative unsworn statement⁶.

¹ Such comment by the court is "in some cases unwise, in others absolutely necessary"; *Reg. v. Rhodes*, L. R. [1899] 1 Q. B. 77. Cf. 12 Cr. App. R. 257.

² See the testimony of no less competent a critic than Sir H. B. Poland, in *A Century of Law Reform*, ed. 1901, p. 54. But it has no doubt led to much perjury; Grantham, J., thought by nine in every ten, Rowlatt, J. (in 1920) by three in every four, of prisoner-witnesses.

³ 40 and 41 Vict. c. 14.

⁴ And probably even when defended; *Reg. v. Shimmin*, 15 Cox 122, *Rex v. Bernay* (*The Times*, June 3, 1907).

⁵ s. 1 (h).

⁶ Allegations of Fact made by him in it are, of course, not "evidence"; as they would be if he took the option of swearing to them and facing cross-examination. Hence as against co-prisoners, they must be disregarded; but as regards himself the jury are allowed to give them whatever weight they may think fit.

If any persons who took part with the prisoner in his crime should be indicted along with him for it, they would nevertheless, even at common law, be competent (and indeed compellable) to give evidence, either for him or for the prosecution, unless they were put up for actual *trial* along with him. Accordingly, a prisoner who desired to call any co-prisoners as witnesses would request a separate trial¹; if he obtained it, he then could call them although their own trial had not yet taken place. Sometimes the Crown calls one of a group of prisoners, as "King's evidence"; but it often takes a formal verdict of acquittal before calling him, to enhance the weight of his evidence.

Even since the Act which rendered accused persons competent to give evidence, a prisoner will still sometimes apply thus to be tried apart from those indicted along with him. For some fellow-prisoner whom he wishes to give evidence on his behalf, may—perhaps from the dread of cross-examination—be unwilling (although now competent) to do so at his own trial². Or the applicant may desire to avoid the danger of the jury's taking into account against himself some evidence which, legally, is only admissible against some fellow-prisoner.

(B) The common law imposed an incompetency to give evidence, not only upon the person under accusation, but also upon that person's wife or husband³. Thus, if several prisoners were tried together, not only all of them but also all their spouses were thus disqualified from giving evidence (even though each one of them was charged in an entirely separate count). The rule produced strange results. Serjeant

¹ In cases of felony or treason, prisoners can even *compel* a separate trial, by "severing" in their peremptory challenges (*infra*, p. 481).

² Even though *A* may have been bound over, by the magistrate who committed *B*, to give evidence for *B*'s defence, he cannot be compelled to give such evidence if he be himself indicted *and tried* along with *B*.

³ Yet no other relationship, not even that of parent and child, was regarded as producing sufficient community of interest with a prisoner to create any incompetency. I saw, in 1909, a woman tried for murder on the evidence of her two brothers and her mother.

Ballantine, in his *Reminiscences*, mentions having once prosecuted a man who obtained an acquittal by calling his mistress to prove an *alibi*, viz. his having been away at the races with her. Had he, instead, taken his wife, she could not have thus given evidence for him. On the other hand, Rush (the Norfolk murderer of 1848) was hanged on the testimony of his mistress. He had promised to marry her; and, had he kept his word, it would have saved his life.

An exceptional competency was, however, almost of necessity, conceded in those cases where the crime consisted in some act of personal violence committed by the prisoner upon the wife or husband. And, in recent years, a few statutes created further exceptions in the case of those crimes in which prisoners themselves were being rendered competent. But the whole doctrine has now been thrown into a new form by the Criminal Evidence Act, 1898¹. The changes thus effected may be summarised as follows.

(I) In all *ordinary* criminal cases:

1. The husband or wife of the party charged is now competent to give evidence, but only for the defence, and only on the application of the party charged² (and is not compellable³ to give evidence).

2. And this husband or wife has the full liability of an ordinary witness to be cross-examined as to credit; not merely the (very limited) liability of a prisoner who becomes a witness under this Act⁴.

3. A prisoner's omission to call the husband or wife is not to be commented upon by the prosecution⁵.

4. To call the husband or wife has the same effect as calling any ordinary witness for the defence, in giving the Crown the right of reply.

(II) Moreover, in the following *exceptional* cases, the

¹ 61 and 62 Vict. c. 36.

² s. 1 (a).

³ *Rex v. Leach*, L. R. [1912] A. C. 305. Not even for the defence.

⁴ *Supra*, p. 408.

⁵ s. 1 (b).

husband or wife of the party charged is a competent witness for either the defence or even the prosecution, and quite irrespectively of the consent of the party charged¹.

1. Cases where the common law itself recognised an exception to the general rule²; viz. upon charges of personal violence committed against the husband or wife in question³. This covers assault or attempt to murder; but not crimes that involve no actual violence, like bigamy or libel.

2. Cases where, under the Married Women's Property Act, 1882⁴, the husband or wife is taking criminal proceedings for an offence committed against his or her property by the prisoner.

3. Cases of the sexual offences dealt with by sections 48–55 of the Offences against the Person Act, 1861, or by the Criminal Law Amendment Act, 1885; Incest⁵; Bigamy⁶.

4. Cases specified in Part II. of the Children Act, 1908⁷, e.g. offences involving bodily injury to a person under sixteen; or in the Prevention of Cruelty to Children Act, 1904.

5. Cases of persons charged under the Vagrancy Act⁸ with neglecting to maintain (or with deserting) their families; or with being *souteneurs*.

6. Cases where criminal proceedings are taken to test or to enforce a *civil* right⁹.

Even before the Act of 1898 the husband or wife was already *compellable* to give evidence in nos. 2 and 6; and, according to the prevailing opinion, in no. 1 also. But it is decided (*Rex v. Leach*, L. R. [1912] A. C. 305) that in the other three cases (nos. 3, 4 and 5) the husband or wife, though a competent witness, is *not* a compellable one.

Rule VI. Documents which require to be stamped are treated differently in civil and in criminal courts.

For purposes of revenue an artificial restriction upon the

¹ s. 4.

² *Supra*, p. 411.

³ s. 4 (1).

⁴ 45 and 46 Vict. c. 75, ss. 12, 16; *supra*, p. 185.

⁵ 8 Edw. VII. c. 45.

⁶ 4 and 5 Geo. V. c. 58, s. 28 (3).

⁷ 8 Edw. VII. c. 67, s. 27.

⁸ 5 Geo. IV. c. 83; *supra*, pp. 324–327.

⁹ Evidence Act, 1877, s. 6 (1); *supra*, p. 409.

admissibility of documents as evidence has been created by the imposition of Stamp Duties upon certain classes of them. Familiar instances are the stamp upon receipts for the amount of £2 or over; the sixpenny stamp upon a written agreement whose subject is of the value of £5; and the *ad valorem* stamp of 2s. 6d. per £100 on mortgages and bonds. Under the earlier Stamp Acts, a document that ought to bear a stamp, and yet bore none, was incapable of being used as evidence in any court whatever, whether civil or criminal. Thus on the trial of a man for having burned down his shop, with intent to defraud the Insurance Company of the sum for which he had insured it, it was held that the absence of any stamp on the policy of insurance rendered it inadmissible in evidence, even though it was tendered for the mere purpose of proving the particular intent alleged in the indictment¹.

Hence such duties formed a conspicuous example of taxes on Litigation; which Bentham condemned as "the worst of all taxes, being denials of justice, co-operating with every injury and with every crime, and directly violating that first of statutes, Magna Charta—'Justice shall be sold to no man².'" But the severity of their operation was greatly mitigated in 1854, when an enactment (now replaced by the Stamp Act, 1891³) established with respect to them an important difference between civil and criminal courts. For whilst in civil proceedings unstamped documents are still incapable of being given in evidence, without at least the payment of penalties⁴, the absence of a stamp no longer prevents any document from being given in evidence in criminal proceedings.

Rule VII. The testimony of witnesses who are abroad can be made available much more easily in civil than in criminal courts.

¹ *Rex v. Gilson*, 2 Leach 1007; R. and R. 138.

² *Works*, IV. 582.

³ 54 and 55 Vict. c. 39, s. 14 (4).

⁴ And some instruments (*e.g.* bills of exchange and bills of lading) can only be stamped at the time of execution; so that, if not stamped then, they cannot be rendered admissible as evidence even by payment of penalty.

The fundamental principle which, as we have seen, excludes hearsay evidence rendered it impossible for such persons to give their testimony by merely sending letters or affidavits, without coming to England to appear in court in person. Even an official telegram from the Madras Government in answer to an inquiry addressed to it by the India Office cannot be given in evidence¹. But in civil courts this difficulty has now been overcome by making a general provision for taking the evidence of such witnesses upon oath, with full formalities, in the foreign country where they reside²; by granting a commission or appointing a special examiner. '

But in criminal courts no such general rule prevails³. In some exceptional instances, however, statutes have sanctioned the taking of evidence abroad for use in criminal cases. The most important of these provisions is one, contained in the Merchant Shipping Act, 1894⁴, which provides for all cases in which an accused person is himself in the foreign country where the witness is (as may well happen if the crime be committed at sea, or abroad). For it permits any deposition on oath made outside the United Kingdom before a proper official—a magistrate if in a British possession, or a British consular officer if in a foreign country—in the presence of the accused to be given in evidence in any criminal proceedings here to whose subject-matter it relates, if, at the time of using it, the witness is not in the United Kingdom⁵.

¹ *Reg. v. O'Flynn*, C. C. C. Sess. Pap. cxx. at p. 916.

² *Rules of the Supreme Court*, Order xxxvii. rule 5.

³ Accordingly in the Tichborne proceedings, the witnesses from Chili, whose evidence had been taken in that country for the civil action, had to come to England to give evidence in person at the criminal trial.

⁴ 57 and 58 Vict. c. 60, s. 691.

⁵ The other statutes are of a less general character. By 13 Geo. III. c. 63, on a prosecution in the King's Bench Division for an offence committed in *India* (*infra*, p. 426), the court may issue a mandamus to Indian courts to take evidence publicly in court; a provision which is extended by 6 and 7 Vict. c. 98, to any offence against the Slave Trade Acts committed outside the United Kingdom, but within the *Empire*. In extradition proceedings, the Extradition Act, 1870 (33 and 34 Vict. c. 52) allows written depositions taken abroad to be given in evidence.

BOOK IV

CRIMINAL PROCEDURE

CHAPTER XXVII

LIMITATIONS ON CRIMINAL JURISDICTION

WE have now explained the Substantive law of crime; and also that portion of the Adjective law which regulates the evidence by which crimes are to be proved. We have, finally, to consider the remaining portion of adjective law; that which regulates the procedure by which offenders who have committed crime are brought to punishment. We may begin by mentioning some limitations upon the exercise of this procedure; and then go on to describe the various courts in which it is exercised.

LIMITATION BY TIME

To civil actions, lapse of time may often operate as a bar; *Vigilantibus, non dormientibus, jura subveniunt*. But it can rarely affect a criminal prosecution. For the King could do no wrong; and consequently it was impossible that his delay in pressing his claims, whether civil or criminal, could be due to any blameable negligence. Accordingly at common law it was a rule that those claims remained unaffected by lapse of time; *nullum tempus occurrit regi*. And though, as regards civil claims, this kingly privilege has now been subjected to grave limitations by 9 Geo. II. c. 16, it still operates almost unimpaired in criminal prosecutions. Hence, in several noteworthy cases, offenders have been brought to justice many years after the commission of their crimes. In 1905 John Appleton received sentence of death (afterwards commuted) on his own confession of a murder committed in 1882

(*The Times*, July 15, 1905). The trial of Governor Wall¹ took place nineteen years, that of Edward Shippey² thirty years, and that of William Horne³ thirty-five years after the respective murders of which they were accused. Stephen⁴, indeed, mentions a prosecution in 1863 for the theft of a leaf from a parish register no less than sixty years previously.

But this rule, that lapse of time is no bar to criminal justice, is subject to a few statutory exceptions. Of these the following are the chief⁵:

(i) A prosecution for treason or misprision of treason must be brought within three years from the commission of the crime; unless the treason either consists of an actual plot to assassinate the Sovereign, or was committed abroad⁶.

(ii) Offenders against the Riot Act⁷ must be prosecuted within twelve months.

(iii) A prosecution for the misdemeanor of carnally knowing (or attempting to know) a girl between the ages of thirteen and sixteen must be brought within twelve months⁸.

(iv) A prosecution by indictment under the Perjury Act, 1911 (s. 4), for making a false statement in registering a birth or death, must be brought within three years.

(v) And for the innumerable offences which are punishable on summary conviction the prosecution must be within six months⁹. For the (very rare) exceptions, see Odgers' *C. L.* II. 1045.

LIMITATION BY TERRITORY

According to International Law, a State ought only to exercise jurisdiction over such persons and property as are within its territory. And in criminal matters it cannot always

¹ 28 St. Tr. 51; *supra*, p. 129.

² 12 Cox 161; A.D. 1871.

³ *Annual Register*, II. 368; *Gentleman's Magazine* for 1759, pp. 604, 627.

⁴ *Hist. Cr. Law*, II. 2.

⁵ Others are mentioned in Stephen, *Hist. Cr. Law*, II. 2.

⁶ 7 and 8 Wm. III. c. 3, ss. 5, 6; *supra*, p. 277.

⁷ 1 Geo. I. st. 2, c. 5; *supra*, p. 286.

⁸ 18 and 19 Geo. V. c. 42, s. 1.

⁹ 11 and 12 Vict. c. 43, s. 11.

exercise jurisdiction over an offender even though he actually be within its territory. For it is forbidden by International Law to try¹ foreigners for any offences which they committed outside its territorial jurisdiction. One unique exception is, indeed, allowed. For persons guilty of any act of "Piracy *jure gentium*"² are treated as the common enemies of all mankind, and any nation that can arrest them may exercise jurisdiction over them³, whatsoever their nationality, and wheresoever their crime may have been committed, even within the territorial waters of some other nation⁴.

Hence the activity of a nation's criminal courts is usually confined to those persons⁵ who have committed offences on its own soil⁶ or on one of its own ships. Accordingly, persons who come into a State's territory, after having committed a crime elsewhere, usually incur no risk of being punished by the courts of their new home for what they did in their old one. In modern times, however, to counterbalance this immunity, almost all civilised countries have concluded Extradition treaties; mutual arrangements whereby any person who betakes himself abroad after he had perpetrated a serious offence may be arrested, and then sent back to take his trial in the country where this offence was committed, if it were not a "political" crime. Since 1870 England has made such treaties with thirty-eight foreign countries. Most of them

¹ Dr T. J. Lawrence's *Principles of International Law*, s. 98, p. 207. The prohibition includes "penal actions" (p. 7); L. R. [1893], A. C. 150.

² *Supra*, p. 319; Lawrence, s. 102, p. 214.

³ As to Conspiracy here for piracy on the high seas, see *Reg. v. Kohn*, 4 F. and F. 88. Conspiracy abroad to kill here is not triable here.

⁴ *The Marianna Flora*, 11 Wheaton at p. 41; *In re Tivnan*, 5 B. and S. at p. 677. But this would not cover acts which, like trading in slaves, are made piracy by local laws alone. For one country—or even several countries—cannot add to International Law.

⁵ But it covers such persons even though they be aliens; *Courteen's Case*, Hobart 270; *Ex parte Barronett*, 1 E. and B. 1.

⁶ As to "territorial waters," see 41 and 42 Vict. c. 73. In our Atlantic island of Ascension a manslaughter was committed in 1851 but no competent tribunal existed there. Hence a special commission was issued for a trial at Winchester (cf. p. 143 *supra*); thirteen witnesses were brought from Ascension (*The Times*, March 5, 1852).

preclude the extradition by us of any British subject. The foreign offender is surrendered under a warrant from the Home Secretary, after an investigation (under an order from him) by the chief magistrate at Bow Street.

Extradition transmits an offender from the territory of one nation to that of another. But even within a nation's own territory, if her constitution be a federated or quasi-federated one, some similar provision may be necessary, in order to transmit offenders from one of the component local jurisdictions to another. Thus within the British Empire, the Fugitive Offenders Act, 1881¹, provides for a surrender, akin to an extradition by a foreign nation, where a person who had committed an offence in one part of the King's dominions² has fled to another part of them. The range of crimes for which such a person may be thus surrendered is naturally much wider than in the case of extradition to a foreign country. It comprises all offences that are punishable (in the territory where they are committed) with not less than twelve months' imprisonment with hard labour. The statute moreover applies even though the conduct with which the fugitive is charged would have constituted no offence at all if committed in that part of the King's dominions to which he has fled³.

International Law, although forbidding States to exercise criminal jurisdiction over any foreigner for an offence committed by him outside their territorial jurisdiction, nevertheless leaves unlimited their power to punish their own subjects. Yet nations vary in their readiness to exercise this power in respect of crimes which their subjects have com-

¹ 44 and 45 Vict. c. 69. As to Protectorates, see 5 and 6 Geo. V. c. 39.

² In consequence of the annexation of the Transvaal, the question was very quickly raised whether this Act applies only when the territory in which the offence was committed formed part of the King's dominions at the date of the offence, or will apply even though the territory did not become incorporated into these dominions until after the crime. Contradictory decisions on this point have been given in South Africa.

³ In 1923 we sent back five fugitives to the colonies and received one from them; and extradited ten foreigners, and obtained six persons by extradition.

mitted whilst away from their native soil. Great Britain (like France and the United States) prefers, in nearly all cases, to adhere to the principle that crimes are local matters, to be dealt with where they are committed. But to this general rule she has by modern statutes made a few exceptions; empowering her courts to exercise jurisdiction over English subjects who commit certain specified offences even upon foreign soil¹.

Doubt has arisen as to whether, even when a man is in England, he would commit any offence against English law by conspiring to commit—or being accessory to the commission of—a crime in some country abroad². For as English courts have no official knowledge of foreign law they cannot be sure that the act, however wicked, is actually a crime by the law of the particular foreign country concerned. Similarly, if a thing stolen abroad were brought to this country by a man who had knowingly received it abroad, and persons knowingly received it from him here, it appeared to lawyers to be doubtful whether they could be punished here³. The general principle still remains unsettled, but particular cases have been dealt with by statute. Conspiracy (or incitement) here to commit a *murder* abroad has been made indictable⁴.

¹ This is the case with, as we have seen, homicide (24 and 25 Vict. c. 100, s. 9, *supra*, p. 143) and bigamy (*ibid.* s. 57, *supra*, p. 306); and piracy (*supra*, pp. 319, 417). So is it with treason and misprision of treason (35 Hen. VIII. c. 2, s. 1); with offences committed by colonial governors (11 Wm. III. c. 12; see *Reg. v. Governor Eyre*, L. R. 3 Q. B. 487); with (*supra*, p. 322) unnatural foreign enlistment (33 and 34 Vict. c. 90, s. 4); with offences against the Ballot Act, 1872, or the Corrupt Practices Act, 1883; or the Official Secrets Act, 1889 (52 and 53 Vict. c. 52, s. 6); and with some offences against the Explosives Act, 1883 (46 and 47 Vict. c. 3). And by the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60, s. 687), with *any* offence committed by British subjects who are, or have within three months been, seamen on a British ship. Cf. p. 298 n², *supra*.

² This doubt was debated hotly in 1858; when various persons had conspired in London to assist Orsini in his project of assassinating Napoleon III. in Paris. Orsini's attempt was made on January 14th, 1858, the Emperor escaping unhurt; but ten of the spectators being killed, and a hundred and fifty-six wounded. The three bombs inflicted 516 wounds.

³ Cf. C. C. C. Sess. Pap. LXXXIV. 295; LXXXVIII. 638.

⁴ 24 and 25 Vict. c. 100, s. 4; *Reg. v. Most*, L. R. 7 Q. B. D. 244.

And the offence of dealing in this country with goods stolen abroad has been dealt with by the Larceny Act, 1916¹; which provides that it shall be an offence, punishable with seven years' penal servitude, to receive, or to have² in possession, in this country, without lawful excuse, any property stolen outside the United Kingdom, knowing such property to have been stolen. Property is to be deemed to be "stolen" whenever it has been obtained under such circumstances that if the act had been committed in the United Kingdom it would have constituted an indictable offence, even though not a larceny. The Act applies not only to cases of receiving in England goods stolen abroad by other persons, but even to cases where the thief himself is found in possession of the goods in England.

A person, although himself abroad, may by the hands of an innocent agent commit a crime in England; *e.g.* by posting in France a libellous letter or a forged telegram, which the postman will deliver for him in London. If the Frenchman come to England, he may be tried here. Similarly³, if money be sent in a letter from England to Holland, in consequence of a false pretence made in London, there is an "obtaining" here, sufficient to give jurisdiction to our courts; for the Dutch criminal has made the English postmaster his agent⁴ to receive the missive⁵.

¹ s. 33 (4).

² Thus covering cases in which not only the act of stealing, but even that of receiving, took place abroad.

³ *Rex v. Stoddart*, 2 Cr. App. R. 237.

⁴ Conversely, a man who without quitting England posts forged bills from here to a foreign country may be held guilty of uttering them *there*. And the very wide definition of "fugitive" in the Extradition Act renders it possible for him to be even extradited by us for trial there, as a "fugitive criminal"; *Rex v. Godfrey*, L. R. [1923] 1 K. B. 24.

⁵ Public-houses are sometimes erected *across* the boundary between Canada and the United States; so that guests may, at need, step into the territory of the laxer liquor-law, and thus avail themselves of the territorial limitation of jurisdiction.

CHAPTER XXVIII

CRIMINAL COURTS

WE may now proceed to describe the various courts that possess a general criminal jurisdiction; considering them in the order of their dignity.

I. *The High Court of the King in Parliament.*

This is the highest court in the realm. Its title must not mislead the student into supposing either that the King sits there in person, or that the word "Parliament" is used in the usual modern sense, as including the House of Commons. But a Parliament, when deprived of the Sovereign and of the Commons, becomes simply the House of Lords; by which, accordingly, the jurisdiction of this court is exercised. That jurisdiction is twofold: (A) as a Court of Appeal, and (B) as a Court of First Instance.

(A) In civil matters the House of Lords is the only final court of appeal on all questions of law from English secular tribunals. But in criminal causes it is only one, and far the less active, of two such courts. Until 1907 its functions of appeal were limited to those extremely rare errors of law which are apparent on the record itself¹. Such an error would appear in any indictment that disclosed no crime. But the Act of 1907² which created the new Court of Criminal Appeal provides that from it there may be an appeal to the House of Lords on any point of law which the Attorney-General certifies to be of such exceptional *public* importance that it is desirable to have the highest decision on it³. A sitting of "Parliament"

¹ Chitty says that the record contains (*inter alia*) the judge's commission, the indictment by the Grand Jury, the arraignment, plea, issue, award of jury, verdict, judgment (*Practical Treatise on Criminal Law*, I. 720). But it never shews the evidence, or the rulings of the judge as to admission or rejection of evidence, or his statements in his summing up to the jury.

² 7 Edw. VII. c. 23. *Infra*, p. 497.

³ *Rex v. Ball*, L. R. [1911] A. C. 47.

for legal appeals differs very gravely from an ordinary sitting of the House of Lords. For, by the Appellate Jurisdiction Act, 1876, there must be present at least three "Lords of Appeal"¹; and, on the other hand, by a rule of constitutional etiquette which has prevailed since *O'Connell's Case* in 1844², all peers who are not lawyers abstain from giving a vote. Moreover, under the Act of 1876, the Lords of Appeal may be allowed by the House of Lords to hold these sittings after the prorogation of Parliament; and the Crown may authorise them to sit even after Parliament has been dissolved.

(B) The House of Lords is also a court of first instance. In this capacity, unlike that already mentioned, it can try questions of fact as well as of law³; and the modern rule of etiquette excluding non-legal peers has no application here. But as the early Chancellors, being ecclesiastics, could take no part in capital trials, it became the practice for the Crown to appoint some peer (it will now probably be the Lord Chancellor himself) as Lord High Steward, to preside. Criminal cases may deserve to be tried before this august tribunal, on account of the dignity of either (1) the accused or (2) the accusers.

(1) Peers when accused of treason, or felony, or the misprision of either, must be tried by their noble peers⁴. This privilege depends upon nobility of blood, not upon the right to a seat in the House of Lords; and accordingly is possessed by peeresses in their own right, wives of peers, infant peers, and non-representative Scotch or Irish peers. The

¹ 39 and 40 Vict. c. 59. These may be either Lords of Appeal "in Ordinary" (i.e. salaried life peers appointed by virtue of the Appellate Jurisdiction Act, 1876), or peers of the realm who have held high judicial office.

² Knight's *Popular History of England*, viii. 520.

³ It thus forms the nearest surviving approach "to the old *judicium parium*" (Holdsworth, i. 389).

⁴ Pollock and Maitland, i. 410. But for mere misdemeanors a peer is tried by an ordinary jury of commoners. The Duke of Leinster was so tried in 1923. Lord Clancarty was so tried (July 22, 1920); the indictment containing twenty-five counts, eleven of which related to eleven obtainings by similar false pretences, all which issues were disposed of in one trial.

weight of authority is decidedly in favour of the view that a peer cannot waive the privilege¹, cumbrous and inconvenient though the form of procedure is², as was vividly shewn by the trial of Earl Russell for bigamy (L. R. [1901] A. C. 446). All prosecutions of peers are, however, commenced in one of the ordinary courts, by an indictment found by an ordinary grand jury; this indictment being subsequently removed into the House of Lords (or into the Lord High Steward's Court) by a writ of *certiorari*.

Bishops cannot be tried by the House of Lords. No bishop has ever been so tried; and Archbishop Cranmer and Bishop Fisher were tried by ordinary juries³. Bishops may however sit at the trial of a secular peer, until the final moment when the lords come to the vote of "guilty," or "not guilty." This disqualification for pronouncing judgment doubtless arose from the rule of canon law which forbade clerks to take part in any sentence of death; though it also has been explained by the doctrine of "ennobled blood⁴."

(2) Any person, whether peer or commoner, who is impeached by the House of Commons must be tried by the House of Lords. A peer may be thus impeached for any crime; and so may a commoner for, at any rate, any high misdemeanor⁵. But as the House of Commons is itself now able to exercise directly an effective political control over the proceedings of the great officers of state, judicial procedure by impeachment has fallen into utter disuse. Its

¹ See Hansard, cccc. 245 (Jan. 31, 1887).

² It will be found vividly described in *Blackwood's Magazine*, Dec. 1850, in an account of the trial of Lord Cardigan in 1841, for firing at Capt. Tuckett in a duel; the latest instance before Earl Russell's case.

³ Yet the Resolution of the House of Lords excluding bishops from trial by the peers (Lords S.O., No. 61), depends upon the doctrine of "ennobled blood"; which Bishop Stubbs regards as historically a mere absurdity.

⁴ Anson on the Constitution, i. 226.

⁵ On the controversy whether a commoner can also be impeached for felony and for treason, or may for these crimes insist on being tried by "his peers," the conflicting cases from 1330 to 1689 are collected in Hatsell's *Precedents* (iv. 397). It is now generally thought that he is impeachable even for these graver crimes. Cf. Anson, i. ch. ix., s. 2.

inconveniences¹ were vividly manifested in the proceedings against Warren Hastings; which lasted from 1786 until 1795. Since Lord Melville's impeachment in 1805² there has been no instance of it; and none is likely to arise. For impeachment, as Lord Macaulay says, "is a fine ceremony, which may have been useful in the seventeenth century, but not one from which much good can be expected now."

II. *The Court of the Lord High Steward of the United Kingdom.*

This court differs in name, rather than in substance, from the tribunal first mentioned. It sits for the purpose of trying peers for treason, or felony, or misprision of either, if the recess or the dissolution of Parliament makes it impossible to have recourse to the House of Lords in its technical form. But it has never sat since 1686. The court consists of such temporal peers as the Lord High Steward³ may summon. But they must not be fewer than twenty-three; since the court decides by a majority, and there cannot be a valid vote of guilty or not guilty unless twelve concur in it. On trials for treason or misprision of treason, it is provided by 7 Wm. III. c. 3 that all the peers who have seats in the House of Lords must be summoned. To this court, unlike the High Court of Parliament, no bishop can ever be summoned; hence there is no doubt that a bishop cannot be tried by this court. Again—though in trials by the High Court of Parliament all the members are equally judges of law as well as fact—in this court there is a division of functions akin to that between a judge and a jury. For the Lord High Steward is the sole judge on questions of law, but cannot vote on facts; and the facts are determined by the rest of the court (who are called "the lords triors").

¹ For an account of the cumbrous process of impeachment, see Anson on the Constitution, i. 384.

² 29 St. Tr. 549. It was described by a lawyer as "not an impeachment of waste, but a waste of impeachment."

³ Who is appointed only for the particular occasion.

III. *The Court of Criminal Appeal.*

Except for those rare errors of law which are actually (in technical phrase) "apparent on the record," the common law provided no court of appeal in criminal cases, although it made abundant provision for civil appeals. Hence the judges had recourse to the wise practice of holding informal meetings to discuss questions of difficulty which had arisen before any of them at criminal trials. By 11 and 12 Vict. c. 78 these informal meetings were superseded by the establishment of a formal tribunal—the "Court for Crown Cases Reserved"—with power to determine points of law that arose upon the trial of any prisoner at either the Assizes or the Quarter Sessions. By the Judicature Acts, this jurisdiction was transferred to the High Court of Justice, *i.e.* the lower section of the Supreme Court of Judicature. Such appeals could be made by the prisoner only, not by the Crown. But he could not make them as of right; for he could not compel the judge to reserve a point. And only questions of law could be reserved, never questions of fact. The annual number of such appeals averaged only eight.

A more comprehensive principle was established by the Criminal Appeal Act, 1907, which created a general "Court of Criminal Appeal¹," that can review any question whether of law or of fact. This Court now consists of the Lord Chief Justice of England along with (by 8 Edw. VII. c. 46) all the judges of the King's Bench Division. It may sit in several divisions; but a sitting requires a quorum of at least three judges². To render impossible an equal balance of opinion, it is enacted that the number of judges present must always be an uneven one. And, further to secure certainty in the law, only a single judgment—as in the Judicial Committee—is usually to be delivered.

This Act of 1907 abolished (s. 20) a very rare form of appeal—the Writ of Error. By this, a decision of the King's Bench

¹ For a full account of its working, see p. 497 *infra*.

² In *Rex v. Norman* (April 29, 1924) *thirteen sat*.

Division upon a point of law that was "apparent on the record" of a criminal case might be brought before His Majesty's Court of Appeal (*i.e.* the upper section of the Supreme Court of Judicature), though that Court was debarred, by s. 47 of the Judicature Act, from receiving any other form of appeal in *criminal* matters. Thence the case might be carried up to the House of Lords.

Thus, since 1907, both His Majesty's Court of Appeal¹ and (in its *collective* form) the High Court of Justice have ceased to exercise any jurisdiction as courts of criminal law.

IV. *The King's Bench Division of the High Court of Justice.*

This tribunal exercises the criminal jurisdiction of the ancient *Curia Regis*². Hence, though the Lord Chancellor is the highest of the judicial functionaries of the realm, not he but the Lord Chief Justice (who presides in this Division) is the head of our criminal judicature. And from it alone is it now usual to select the judges of assize; not from any of the other Divisions of the High Court.

Like the House of Lords, the King's Bench Division has cognizance both of matters of first instance and of matters of appeal.

(A) As a court of first instance, the King's Bench Division possesses (though in modern times it is not in every year that it exercises³) an original jurisdiction in four classes of offences. For it can try the following ones:

(1) Any crime committed out of England by one of our public officials in the execution of his office⁴.

¹ Except that in the *quasi*-criminal offences of obstructing (or not repairing) a highway or bridge or river, the Act of 1907 confers—s. 20 (3)—on the convicted offender the same full rights of appeal as if he were a defendant in a civil action at assizes; apparently including the right of resort to His Majesty's Court of Appeal.

² Anson, *Law and Custom of the Constitution*, II. ch. x. sect. 1. § 1.

³ In 1922 four persons were so tried; in 1923 none.

⁴ For crimes by governors of colonies such trial was authorised so far back as 11 Wm. III. c. 12; and 42 Geo. III. c. 85 made it applicable to all officials abroad.

(2) Any misdemeanor, in whatever part of England committed, for which an "information"¹ (dispensing with all recourse to a grand jury) has been filed by some officer of the Crown.

(3) Any indictable crime (whether a misdemeanor or even a felony or treason) that has been committed in Middlesex.

(4) Any indictable crime, in whatever part of England committed, an indictment for which has been found in some other court (*e.g.* at the Assizes) and has since been removed by *certiorari* into the King's Bench Division for trial. The object of such a removal may be either to secure a "trial at bar," or to enable the case to be tried with some of the incidents of civil procedure.

A trial at the bar of the King's Bench Division takes place before three of its judges with (usually) a special jury². But cases that have been removed into the King's Bench Division for trial are usually tried not at bar but before a single judge of that Division; either in London, or else at some Assize (usually that of the county whose grand jury found the indictment) but on its civil side (the King's Bench Division having no power over the criminal side of an Assize Court). The costliness of this procedure makes it impossible for any but a rich defendant to apply for it. In such proceedings, unlike ordinary criminal ones, a special jury may, if the charge is one of misdemeanor, be obtained, at the wish of either the prosecutor or the defendant.

(B) In its appellate functions the King's Bench Division is much more active. They are usually exercised through two (or three) of its judges sitting as a Divisional Court. The appeals are of two kinds.

(1) By a writ of *Certiorari* the proceedings of Quarter Sessions or of any still lower tribunal—but not of Assizes or of the Central Criminal Court—may be brought before it, at

¹ *Infra*, p. 460.

² The latest cases are those of the leaders of the Jameson Raid, 1896; of Lynch, 1903; and of Casement, 1916 (12 Cr. App. R. 99).

the instance of either the prosecutor or the defendant, to be reviewed and, if necessary, quashed for error of law; *e.g.* absence of jurisdiction.

(2) By a Case being stated by justices of the peace at petty sessions¹ (at the instance of either prosecutor or defendant), any question of law that has arisen before them may be submitted to the King's Bench Division.

V. *The Courts of the Commissioners of Assize.*

These ancient itinerant criminal tribunals are created by two commissions² issued two, three, or four times³ a year (according to the county), to judges of the High Court and some eminent members of the bar, authorising them to try the prisoners presented for trial by the grand juries of the several counties for which the Assize is to be held. One criminal commission is that of Oyer and Terminer ("to hear and to determine"); giving authority to try all prisoners against whom true bills have been found at that particular Assize. The other is that of General Gaol Delivery, giving authority to try all prisoners who are in gaol or have been released on bail; whatever may have been the Assize at which

¹ Courts of Quarter Sessions also may state a case for the consideration of the King's Bench Division, but only in regard to some matter that has come to them on appeal from petty sessions.

² See Stephen, *Hist. Cr. Law*, i. 75-144.

³ The counties are grouped into seven circuits; one of which, the "North and South Wales circuit" has two Divisions. Of the Winter Circuits, some begin as early as Jan. 11; only Manchester, Liverpool, and Leeds have an Easter Circuit; of the Summer Circuits, some begin as early as May 24; of the Autumn Circuits, some begin as early as Oct. 12. The Winter and Summer ones are civil as well as criminal; but at the Autumn one (which is held in only forty-seven towns, instead of the fifty-nine and fifty-seven of the two greater circuits) no civil business is usually taken, except in six large towns. By the Assizes and Quarter Sessions Act, 1908 (8 Edw. VII. c. 41), power is given to dispense with the holding of any Court of Assizes, or of Quarter Sessions, if, on the fifth day before its appointed date, there are not yet any cases for it to try. And the Administration of Justice Act, 1925 (15 and 16 Geo. V. c. 28. s. 1) empowers the Lord Chief Justice and Lord Chancellor to dispense with the holding of a forthcoming Assize at any place where no substantial amount of business is expected on that

the bills against them were found. There is, in practice, little difference between the lists of prisoners triable under the two commissions; and the two commissions form only one document. The courts thus held, are now, by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 18, to be regarded as branches of the High Court of Justice. They can try any indictable offence whatever, and are the most important of our criminal courts of first instance. But they have no appellate jurisdiction.

In London and its suburbs, for a population of over eight millions, the function of the Assizes is discharged by the Central Criminal Court—a special tribunal created by 4 and 5 Wm. IV. c. 36; the Commissions of Oyer and Terminer and of General Gaol Delivery for the metropolitan district being addressed to the Lord Mayor and Aldermen of the City of London, along with all the judges of the High Court, the Recorder, the Common Serjeant, and others. The Lord Mayor is, titularly, the head of the commission. The sittings under these commissions are held monthly. They sometimes proceed in as many as four courts simultaneously (once, in 1911, in five); one or another legal member of the commission presiding in each of these.

VI. *General Quarter Sessions*¹.

These, in their oldest form, are meetings of the justices of the peace² of a particular county; and two at least of such justices must be present. They are held once a quarter³, or, by adjournment, oftener. More recently, 108 cities and boroughs have also obtained the privilege of a local Court of Quarter Sessions; presided over, however, not by justices of the peace, but by a Recorder, who is the sole judge. He must be a

¹ More technically, "The Courts of the Sessions of the Peace"; quarterly or other. Those for London try one-fifth of all the persons indicted in England and Wales and are held twice a month. But the Quarter Sessions of the City of London, though sitting to hear appeals, try no jury cases. These, however trivial, go to the Central Criminal Court.

² The title "justice of the peace" occurs as early as 1378; Rot. Parl.

³ Within three weeks before, or after, quarter-day; C. J. Act, 1925, s. 22.

barrister of at least five years' standing¹. Every Court of Quarter Sessions, whether for a county, a city or a borough, has both an original and an appellate jurisdiction.

(A) As a court of first instance it can try all indictable offences except²:

(i) Such felonies—other than burglary³—as are punishable, on even a first conviction, by penal servitude for life or by death.

(ii) Certain specified crimes which, though less grave than those already enumerated, are likely to involve difficult questions of law; *e.g.* praemunire, blasphemy, conspiracy, incest, forgery, bigamy, concealment of birth, perjury, libel, the offences created by the Criminal Law Amendment Act, 1885⁴.

For all indictable crimes, except these two classes, Courts of Quarter Sessions have a jurisdiction concurrent with that of the Assizes⁵.

¹ In the Quarter Sessions of counties (except two or three populous ones possessing salaried Chairmen) there is no such guarantee for the accurate administration of justice. It is a singular paradox that our constitution should permit trials (not merely for petty matters of police but) for charges that seriously affect men's character and liberty to be conducted by persons who, however honourable and eminent, are legally untrained, whilst it requires a civil suit for the smallest ordinary debt to be heard before a professional lawyer. The evil is the greater because criminal practice, being badly paid, does not attract the most experienced advocates; and because the Bench at Sessions, being a numerous body, have less sense of responsibility than an individual judge. The percentage of successful appeals from *County Sessions* is more than double that from convictions before Recorders.

² 5 and 6 Vict. c. 38. Before this Act it could try almost any crime; though in practice it rarely dealt with the most serious felonies. For Peterborough's unique powers, see 15 Cr. App. R. 122.

³ Sessions are now authorised (6 and 7 Geo. V. c. 50, s. 38) to try such cases of burglary as are *not* grave or difficult. More than two-thirds of the indictments for burglary, actual or attempted, are now tried by them.

⁴ The Criminal Justice Act, 1925, s. 18, Sch. 1, removes, as from June 1, 1926, some of the exceptions. *E.g.* conspiracies to cheat and defraud, fraudulent conversion (*supra*, p. 236), brothel-keeping, sacrilege (*supra*, p. 180), arson of crops or stacks, false statutory declarations at Quarter Sessions, are made triable.

⁵ Quarter Sessions of counties and boroughs try more prisoners than the Assizes and the Central Criminal Court combined. Thus in 1927, only 3077

(B) All Courts of Quarter Sessions have also an appellate¹ jurisdiction (extending to questions not only of law but even of fact) over convictions that have taken place at Petty Sessions. But its details can more conveniently be considered in connexion with the latter tribunals (see p. 443).

VII. *The Coroner's Court.*

The Coroner's Court, which has a history stretching back for seven hundred years², is held as a Court of Record for inquests upon cases of homicide or sudden death³. But its criminal function is only to accuse and not to try. The finding of a Coroner's inquest, accusing a prisoner of murder or manslaughter is equivalent to an indictment by a grand jury. It is the practice, however, in such cases to take the precaution of also preferring a bill of indictment before the grand jury; and if this bill is thrown out it is not usual to offer any evidence upon the coroner's inquisition⁴. But if a true bill be found, the accused can be tried upon both the indictment and the inquisition together.

VIII. *Petty Sessions*⁵.

These constitute a noteworthy survival of the mediæval idea of a Popular justice; (now generally superseded by the

persons were tried at these latter courts, but 4059 at Quarter Sessions. Of the latter about two-thirds go to the Quarter Sessions of counties, and about one-third to those of boroughs. Nearly three-quarters of the indictments for offences against Property are tried at Quarter Sessions; but only about a fifth of those for offences against the Person.

¹ The Quarter Sessions for the City of London, as we have seen (*supra*, p. 429 n.), sit only for this appellate work and for civil business.

² See Pollock and Maitland, i. 379; and the introduction to the Selden Society's *Select Coroners' Rolls*. 1 Bl. Comm. 346.

³ From 30,000 to 37,000 inquests are held in each year.

⁴ For "in coroners' courts, witnesses often do not fully appreciate the responsibilities of their evidence"; Avory, J. See p. 545 *infra*.

⁵ This is a modern term; of somewhat uncertain origin and meaning. "There is some difficulty," said Patteson, J., "in saying what is a Petty Session" (8 C. and P. 440). The current definitions limit it to cases where *two or more* justices are present. But it is difficult to see what other name than it can be given to a court held by a single justice when exercising

Royal justice, which acts only as *Magna Charta* provides (s. 45) through professional experts "*qui sciunt leges regni*"). For they are composed of justices of the peace, gentlemen or ladies¹, not necessarily of legal experience, nominated to their office by the Lord Chancellor; who acts on the advice of the Lord Lieutenant in the case of the county justices, and of the Home Secretary in the case of borough² justices. The sittings of Petty Sessions constitute the basis of the government of this country. By being held in every locality, and with great frequency, they effectively secure public order and tranquillity. Through them "more than through any other agency (except the tax-gatherer) are the people brought into contact with the government³." And by them mainly is the popular standard of justice educated. In the scale of dignity such sittings of justices of the peace are the lowest of our criminal courts; but the amount of work done by them is so vast that they play a far more important part in our penal system than some tribunals of much greater dignity. "They have to deal with a wider range of subjects and a greater variety of cases than even a judge of the High Court⁴." The vast majority—say, about two-thirds of a million annually—of our criminal cases are entirely disposed of by justices in

(*infra*, p. 435) his summary jurisdiction. The term "Session" does not itself involve any idea of plurality. For every Recorder, though sitting alone, is said to hold a Session; and an alderman of the City of London, though sitting alone, can constitute a petty sessional court (52 and 53 Vict. c. 63, s. 13 (12)), and therefore, *a fortiori*, a petty session. Some writers, who require two justices, seem to suppose a court of petty sessions to be identical with a petty sessional court; but two justices, if sitting in an "occasional" court-house, would admittedly constitute the former, yet would not constitute the latter. In two modern Irish statutes (6 and 7 Wm. IV. c. 34, ss. 2, 7, and 14 and 15 Vict. c. 92, s. 1) a *single* justice is spoken of as constituting a Petty Session.

¹ See p. 479. In April 1925 there were 669 women magistrates in the counties of England and Wales, and 405 in the boroughs. There are in all about 25,000 justices; sitting for 85 "counties" (in 750 petty sessional divisions) and 227 boroughs.

² For now the Crown may, on the petition of any borough, grant it a separate commission of the peace. But the persons appointed to act as justices under this are not thereby authorised to act in any Quarter Sessions.

³ Lord Brougham.

⁴ Troup's *Home Office*, p. 79.

their Petty Sessions; and the remainder are usually commenced before them. General consent, corroborated by statistical evidence¹, testifies that in these matters—where, as there is no jury, the questions for the bench to decide are far oftener of fact than of law, and where no punishment of great severity can be imposed—the justices discharge their duties with conspicuous success.

In exercising some of their many functions they do not constitute a court of law (although they may have to sit in public, and to take evidence and act on it); as in some of their licensing duties². In others, although they do constitute a court, it is not one of summary jurisdiction; as when conducting a merely preliminary examination into some grave charge, which they will send to be tried by a jury³. And even when sitting as a court of summary jurisdiction, to try a charge and adjudicate upon it finally, they do not always constitute a "Petty Sessional Court"; as when sitting in a building which they only occasionally use⁴.

By the Children Act, 1908 (8 Edw. VII, c. 67, s. 111), a court of summary jurisdiction, when dealing with any case that concerns a person under sixteen, with no adult co-defendant, is called a "Juvenile Court." It (a) must sit either in a different room, or else at a different time, from its ordinary one; and (b) must exclude all persons, except those directly concerned in the proceedings and the newspaper reporters⁵.

¹ *Infra*, p. 443, n. 5. Gneist, the most authoritative of all foreign critics of our institutions, pronounces English justices of the peace to exhibit "den Charakter des Richteramts in seiner besten Gestalt."

² For the decision in *Boulter v. Justices of Kent* (L. R. [1897] A. C. at pp. 563, 573) narrows the wide definition of "court of summary jurisdiction" given in the Interpretation Act, 1889. When sitting thus (*i.e.* not "judicially" but "administratively"), they may act on *unsworn* testimony or on their own knowledge.

³ *Infra*, p. 452. ⁴ *Infra*, p. 435. Yet they still are a "Petty Session."

⁵ In 1923 these courts tried 28,769 juveniles; the "children" being about as numerous as the "young persons." Less than five per cent. were girls. Nearly nine-tenths were found guilty; but of these only about a half were actually punished (chiefly by Fines), and about a fourteenth were put under Probation. Even when the charge is proved, the Act forbids a conviction to be recorded.

CHAPTER XXIX

SUMMARY PROCEDURE

THE summary jurisdiction of justices of the peace is the creation of statutes. Parliament has thus immeasurably extended the common-law powers of justices, whilst at the same time reducing to a minimum¹ their legal responsibility; and the steady tendency of modern legislation is towards giving enhanced importance to these courts of summary jurisdiction. It is advisable, therefore, to consider their procedure somewhat fully.

This summary jurisdiction is not exclusively criminal, but extends also to a few civil cases. It may in some matters be exercised (though even in them only to a limited extent) by a single justice; but in most it is necessary to have either two ordinary justices² or a Stipendiary magistrate or a Metropolitan Police magistrate³. It is always subjected to a stringent limitation of Time; for the proceedings must be begun within the six months following "the time when the matter arose⁴." And for its exercise a prescribed Place of meeting is now made essential, in order to secure ready access for the public. Two classes of such places are recognised.

¹ See now 11 and 12 Vict. c. 44.

² If several justices sit, the majority decide; the Chairman has no casting vote. Accordingly if the votes be equal, the matter must either drop in order to be renewed before a different Court, or else one justice must withdraw his vote—perhaps the junior, or one whose vote is opposed to that of the Chairman.

³ The latter two classes of magistrates must be barristers of several years' standing; each accordingly is empowered to exercise all the power that a fully petty-sessional court of two justices would possess. "Stipendiaries" are appointed in some provincial towns; if one sits with other justices, he has only a single vote. But a "Metropolitan Police magistrate"—there are twenty-five such, sitting at fourteen courts—is the sole judge, even though other justices be on the bench with him.

⁴ 11 and 12 Vict. c. 43, s. 11. Exceptions are most rare. Cf. p. 416 n. *supra*.

(1) The habitual place of meeting of the justices of the locality—their “petty sessional court-house¹.” *Two* justices, by sitting here, constitute themselves a “Petty Sessional Court”; and such a court alone can exercise the summary jurisdiction to the full. For a single justice, wherever sitting, can only hear certain classes² of cases; and even in them he can pass only a limited sentence—an imprisonment of not more than fourteen days, or a fine of (including costs) not more than twenty shillings³.

(2) In counties, even the area of a single petty sessional division may be so wide as to make it convenient to provide in it subsidiary places of meeting for use in case of emergency. Such a place is called an “occasional court-house⁴.” When sitting in it, even a bench of two or more justices can inflict no greater sentence than that which a single justice could; though they are not limited to his range of cases⁵.

Justices can compel the attendance of any witness in any case before them (alike in their summary jurisdiction⁶, both civil and criminal, and also in their preliminary hearings of indictable offences), by issuing a summons to him to come⁷, or even, in case of need, a warrant to bring him. The hearing of any matter within the summary jurisdiction is commenced by stating to the defendant the substance of the information or complaint⁸. If he denies its truth, the case proceeds. The prosecutor, or complainant, opens his case by a speech; and

¹ As to “Juvenile Courts,” see p. 433 *infra*.

² *E.g.*, “Found drunk” in a public place; Vagrancy offences.

³ 42 and 43 Vict. c. 49, ss. 20 (7), 20 (9), 49.

⁴ *Ibid.* s. 20 (4).

⁵ s. 20 (7).

⁶ 11 and 12 Vict. c. 43, s. 7.

⁷ Or to produce documents or things; 4 and 5 Geo. V. c. 58, s. 29.

⁸ The “information” (or, similarly, the “complaint”) is at once the foundation of the justices’ jurisdiction and the definition of the charge (*Reg. v. Hughes*, L. R. 4 Q. B. D. 614); it is in the nature of an indictment. (The summons or warrant is, on the other hand, a mere process to secure the defendant’s presence; and consequently its absence or its illegality does not

then calls his witnesses, who are examined in chief, cross-examined, and re-examined. The defendant may then similarly open his case, and his witnesses are similarly heard. The other party may then, if necessary, call rebutting evidence. But neither side has (as at trials before a jury) any right to make a second speech; unless some point of law arises. The decision of the justices is then given. If it be against the defendant, they have power, both in civil and in criminal cases, to adjudge him to pay to his opponent such costs as they shall think fit. If, on the other hand, they dismiss the case, they can similarly direct costs to be paid to the defendant; or by him, if the charge was (see p. 438) proved.

The summary jurisdiction of Petty Sessions covers, as we have said, both civil and criminal cases.

(1) The civil jurisdiction is the less important. Amongst the matters coming within it are bastardy¹ proceedings; disputes between employers and workmen; matrimonial separations; claims for District rates, or for contributions due under Public Health Acts from the owners of house property, for making streets or repairing sewers, (contributions which are sometimes of large amount²). These civil proceedings are commenced by a "complaint." It is never made on oath, and

affect the jurisdiction of the court, so long as he is in fact present before it to answer to the accusation.) But the charge so defined need not be adhered to with such strictness as an indictment is. For, as Lord Russell said, the hearing is not "of," but only "based on" the information. By 11 and 12 Vict. c. 43, ss. 1, 9 the justices may disregard any small variance between the information (or complaint) and the evidence adduced in support of it, and give judgment against the defendant accordingly; unless he has been so far misled by the variance that it is right to adjourn the proceedings to enable him to meet the charge in the shape it has now assumed. (But they are not authorised actually to "amend" the summons or information or complaint, as is so often done, in order to fit it to the unexpected evidence that is thus given.) This provision, however, only applies to variances in the mere circumstances of the charge; not to evidence which discloses some charge legally different from that alleged in the information or complaint, even though the difference be only that between being "drunk and riotous" and being "drunk"; *Martin v. Pridgeon*, 1 E. and E. 778.

¹ In 1927 there were 7988 applications for affiliation orders; 6570 of which were successful. As to orders for Adoption, see p. 545 *infra*.

² *E.g.* £546 from one estate; *Corbett v. Badger*, L. R. [1901] 2 K. B. 278.

need not be made in writing¹. Only a summons can in the first instance be issued; though, should the defendant fail to appear in obedience to the summons, a warrant for his arrest may then be issued, if the complainant substantiates his claim upon oath². As in all other civil proceedings, the defendant can be compelled to give evidence on oath. If the case be decided in favour of the plaintiff, it can only produce an order to pay money, which creates a mere "civil debt." Hence payment of it cannot be enforced by imprisonment; except in case of wilful non-payment³ when the defendant has it in his power to pay; and even then it is only a civil and not a criminal imprisonment.

(2) But in criminal cases the summary jurisdiction covers some hundreds of offences; *e.g.* many petty forms of dishonesty or of malicious damage, acts of cruelty to animals, transgressions against the bye-laws that secure order in streets and highways, and violations of the laws relating to game, intoxicating liquors, adulteration of food, revenue, public health, and education⁴. The proceedings commence with an "information," which (unlike a "complaint") must usually be in writing⁵; and may (though it need not) be on oath. If it be on oath a warrant may, even in the first instance, be issued for the arrest of the defendant⁶. If it be not on oath, only a summons can be issued in the first instance⁷; though if the defendant fails to appear in answer to the summons, a

¹ 11 and 12 Vict. c. 43, s. 8.

² *Ibid.* s. 2.

³ Or, in the case of a bastardy order (42 and 43 Vict. c. 49, s. 54).

⁴ Occasionally a severe pecuniary penalty is possible; *e.g.* that for keeping a gaming-house may amount to £500 (17 and 18 Vict. c. 38, s. 4); and so may that upon a railway company which provides any special facilities for conveyance to a prize fight (31 and 32 Vict. c. 119, s. 21). In 1921 fines of £2000 and £2500 were inflicted at Old Street police-court on smugglers.

⁵ You "lay" an Information, but "make" a Complaint.

⁶ 11 and 12 Vict. c. 43, s. 2.

⁷ For the comparative statistics see p. 452 *infra*. In London police courts, it is the courteous practice that defendants who appear on a summons stand outside the "dock"; and only those who have been arrested have the humiliation of going inside it.

warrant can then be issued¹. At the hearing, as the proceedings are criminal, the defendant cannot be compelled to give evidence; though since the Act of 1898 (*supra*, p. 407) he now can do so if he desires. If the hearing results in a conviction the sentence may impose imprisonment (which can only very rarely exceed six months) or a fine; and payment of the fine is enforceable by (criminal) imprisonment². The justices are invested in these criminal cases with a remarkable statutory power of shewing mercy³. For if, though the charge is proved, they think it unwise⁴ actually to punish, they may discharge the offender on his giving security to be of good behaviour and appear when called on; or they may even, in spite of the charge being proved, dismiss it altogether. But, in taking either course, they may, if they like, order the defendant to pay to the prosecutor, as damages, any sum up to ten pounds⁵ (cf. p. 95 *supra*), and to pay costs.

The summary criminal jurisdiction was originally concerned only with non-indictable offences; but it has since been extended to some exceptional cases of indictable ones. Some of these are misdemeanors. Thus, as already mentioned⁶,

¹ By the common law anyone accused of crime must appear in person at the bar of the criminal court. But, by statute, courts of summary jurisdiction, as the offences are trivial, may try an offender in his absence, except in London (11 and 12 Vict. c. 43, s. 13). Thus if a defendant who has been served with a summons does not appear at the appointed time, the justices may either issue a warrant to bring him up, or they may instead proceed to hear and determine the case without him.

² But without *hard* labour; Criminal Justice Administration Act, 1914, s. 16 (1). A convicted "juvenile adult" (*infra*, p. 509) may be sent on to Quarter Sessions to be *there* sent to a Borstal institution.

³ And they exercise it in some twelve per cent. of their cases; indeed in about forty per cent. of those *indictable* offences that they determine summarily.

⁴ *E.g.* from the character, antecedents, age, health, or mental state of the offender; or from the triviality of his offence, or the extenuating circumstances.

⁵ 7 Edw. VII. c. 17, s. 1 (3). Even now "it would be well"—as Lord Brampton said long ago—"if justices oftener bore in mind this power of awarding damages."

⁶ *Supra*, p. 160. As to magisterial Orders for matrimonial separation after an *aggravated* assault, see p. 161 *supra*.

assaults (when not so grave as to be of a felonious character¹) may be thus tried, provided that the person assaulted be himself the prosecutor. And, by consent of the accused, charges of libel when brought against the publishers of a *newspaper*² may also be tried summarily. And even some cases of felony may be thus tried.

By the Summary Jurisdiction Acts, 1879 and 1899³, power has been given to Petty Sessional Courts to deal summarily with three large classes of offenders, whom previously they could only have committed for trial by a jury, in a higher court. The power is only to be exercised if, during an examination for such commitment, the justices "become satisfied by the evidence that it is expedient to deal with the case summarily." The expediency will, of course, depend both upon the circumstances of the particular case and also upon the antecedents of the person accused. But even when the justices desire thus to try an offender summarily, his own consent⁴—or, if he be a child under twelve, the consent of his parent or guardian—will also be necessary to waive his common-law right of being tried by a jury. The three classes who may thus be dealt with are the following:

(i) "Children" under fourteen, when charged with any indictable offence whatever, except homicide. But the punishment must not exceed one month's "detention" or a fine of forty shillings, with or without a whipping; and a whipping may be ordered alone⁵.

¹ 24 and 25 Vict. c. 100, ss. 39, etc. And when not charged as an "affray" i.e. fighting in a public place, so as to cause general affright.

² 44 and 45 Vict. c. 60, s. 5. But the libel must be of only a trivial character, and the only punishment that can be inflicted is a fine (which must not exceed £50). See also p. 471, n. 2, *infra*.

³ And now the Criminal Justice Act, 1925, s. 24. Six-sevenths of all the trials for indictable offences take place thus.

⁴ Such consent is usually given readily; in order to avoid the risk of imprisonment whilst awaiting trial, and of receiving a severer sentence than it is possible for the Petty Sessions to inflict.

⁵ 42 and 43 Vict. c. 49, s. 10 (1). The whipping will be with a birch rod, and not more than six strokes. Even in cases of Felony, the child may be merely fined; 4 and 5 Geo. V. c. 58, s. 15 (3). No whipping for girls.

(ii) "Young persons," from fourteen until sixteen years of age¹, when charged with any indictable offence whatever, except homicide. The limit of punishment is, however, extended to three months' imprisonment, with or without hard labour (but only if too unruly or depraved for mere "detention"); or, instead, to a fine of £10.

(iii) Adults (*i.e.* those who have reached sixteen) only when charged with certain particular offences² (Criminal Justice Act, 1925, s. 24 and Sch. II.); the chief ones being:

Simple larceny, thefts punishable like larceny, stealing from the person, stealing fixtures, stealing electricity, stealing by lodgers, stealing in a port or dock, stealing trees or shrubs in private grounds, stealing by a clerk or servant; embezzlement, obtaining by false pretences, obtaining credit by fraud, receiving stolen goods, falsification of accounts; arson of crops, malicious damage (even when over £5); false statutory declarations; assaults occasioning actual bodily harm, inflicting grievous bodily harm, indecent assaults on persons under sixteen, attempts at suicide; procuring, abetting, or inciting to, any offence which can be dealt with summarily.

But the punishment must not exceed six months with hard labour, or a fine of £100, or both. And for merely inciting to commit an offence punishable summarily the maximum punishment must be no greater than for actually committing that offence.

By a converse innovation, the Summary Jurisdiction Act, 1879, has made it possible for the graver of the non-indictable offences to be dealt with, instead, by indictment. For it enacts

¹ See 8 Edw. VII. c. 67, s. 128 (1).

² The additions made to the list of these offences by the Act of 1925 begin to take effect on June 1st, 1926. It might be well if, when an adult accused of *any* small indictable offence admits it, justices were authorised to record the admission and send him to the higher court for sentence only, instead of trial (*cf.* III. on p. 327); thus saving the witnesses from having to attend that court.

(s. 3) that any offence (except assault) for which, on summary conviction, a sentence of imprisonment for more than three months can be imposed, shall be dealt with by indictment if at the hearing, before the charge has been gone into, the defendant claims to be tried by a jury¹.

When dealing summarily with indictable offences the justices may now, by 8 Edw. VII. c. 15, s. 6, order the convicted defendant to pay the costs of the prosecution. Their consecutive sentences, for his two or more *indictable* offences, must not exceed in the aggregate twelve (for *unindictable*, six) months; C. J. A. Act, 1914, s. 18.

The same Act provides (s. 13) that no sentence of imprisonment passed on a *summary* conviction (whether for an indictable or a non-indictable offence) shall be for less than five days. For four days or less, "detention" in police custody may be ordered.

An important restriction upon *all* exercise of summary jurisdiction by justices must be noticed. In consequence of the difficulties of the English law of land, they have immemorially been debarred from dealing with any question which involves the decision of a *bond fide* and legally possible claim to real property or to some right therein. Hence if a riotous crowd pull down the fences enclosing a gentleman's estate, which they reasonably, even though erroneously, believe to be common land, the justices cannot try them.

The practical importance of the various powers of justices is vividly shewn by our criminal statistics. Thus, in 1926, in addition to all the civil cases and to several thousand merely "quasi-criminal" ones, which they determined, they decided summarily no fewer than 617,823 charges of petty offences², as well as 56,275 charges of indictable offences

¹ Accordingly, when any person appears before justices upon a charge of any such offence, they must—before taking any evidence—inform him of his right to be tried by a jury (42 and 43 Vict. c. 49, s. 17 (2)). Fewer than forty a year exercise the right—a tribute to the public confidence in Petty Sessions.

² Such charges are proved in about eight cases out of every nine. Of the petty offences proved, only about a thirtieth end in imprisonment.

against persons who elected to be tried summarily; besides committing 7136 persons for trial before a jury¹.

APPEALS FROM PETTY SESSIONS

There are, as we have already seen (pp. 427, 431), two tribunals by which the summary proceedings of justices may be reviewed; the King's Bench Division and the Quarter Sessions.

(1) The control of the King's Bench Division is exercised in two ways:

(a) It may issue a writ of *certiorari* to bring up a conviction, and quash it, if necessary, for some defect of law which vitiates it; *e.g.* if the justices have convicted on an "information" that was not laid within the six months².

(b) It may determine any case which justices have themselves stated for its decision, as to any point of law that has been determined by them³ (whether apparent on the face of the proceedings, or not); *e.g.* where they have overruled a defendant's objection that the evidence against him was not

¹ A further and a noteworthy (though not a strictly official) service rendered by these courts in London (and sometimes elsewhere) is that of giving advice *in camera* to the poor in their difficulties. Sir James Vaughan, the late Chief Magistrate of the Metropolis, says: "To our courts the poor resort with confidence; they come and lay before us their own various troubles and difficulties, and cases of oppression which they have met with; and they ask our advice. The confidence thus engendered amongst the people of a district is such that very many wrongs are redressed without issuing any summons at all, simply by the magistrate's sending a message by a constable to the party complained about." A French eyewitness of these consultations found "quelque chose de frappant à voir la confiance qu'ont les malheureux dans la bonté des magistrats. C'est pourquoi la justice reste toujours populaire." (Franqueville, *Syst. Jud. G.-B.* II. 326.)

Continental observers are moreover surprised to find in every London police-court, and in many provincial ones, both a Poor-box and a Police-court Missionary. In fully four hundred courts of Petty Sessions there are now such Missionaries, male or female—working with a success universally recognised.

² *Supra*, p. 434. This Division may also intervene to compel justices to perform duties devolving upon them; *e.g.* by granting a Mandamus, or rule, requiring them to issue a summons or to hear and determine a charge.

³ 20 and 21 Vict. c. 43, s. 2; 42 and 43 Vict. c. 49, s. 33.

legally sufficient to support a conviction. They may state such a case at the instance of either party; not like appeals from trials before juries, which can only be (p. 425 *supra*) at the instance of the defendant¹.

(2) The appellate jurisdiction of Quarter Sessions is not, like that of the King's Bench, coextensive with the whole range of the summary jurisdiction of justices. It arose first in the case of particular offences to which it was expressly attached by the respective statutes that prohibited them. And for most of the non-indictable offences such an appeal came to be thus allowed to the defendant; and occasionally even to the prosecutor. But, now, the Criminal Justice Administration Act, 1914, has made a general provision that any person aggrieved by any conviction of a court of summary jurisdiction, for any offence², may appeal to Quarter Sessions (unless in the lower court he admitted his guilt³). On the other hand, these appeals are not—like those to the King's Bench Division—limited to questions of law; for the Quarter Sessions hear the whole case over again⁴ (even new witnesses, who were not heard at Petty Sessions, being admissible). The appeal is heard before the justices of the Quarter Sessions alone, without any jury⁵.

¹ Even when justices have refused to state a case, the King's Bench Division may order them to do so (42 and 43 Vict. c. 49, s. 33).

² 4 and 5 Geo. V. c. 58, s. 37 (1). Even for an *indictable* offence; though previously no appeal was allowed in such cases. But there is no similar general right of appeal from Petty Sessions in civil cases.

³ But, even after that admission, the Criminal Justice Act, 1925, s. 25, will (from June 1, 1926) allow him to appeal against his *sentence* (though not against his conviction). It also allows (s. 7) an appeal against a Probation Order. And by s. 20, on *all* these appeals, either party, if dissatisfied with the determination of a point of law, may apply to have a case stated, as in 1 (*b*).

⁴ Accordingly it is not here, as in appeals in higher courts, for the appellant to shew that the decision of which he complains was wrong; but for the respondent to shew that it was right. Hence if the prosecutor does not appear, the Quarter Sessions will have to quash the conviction (*Reg. v. Purdey*, 5 B. and S. 909); and this even though the appellant does not dispute its validity, but only desires a lighter sentence.

⁵ The number of cases in which any of these appeals are made, either to the King's Bench or to Quarter Sessions, is very small; the yearly average

being less than a hundred to the former, and (since the Act of 1914) about three hundred to the latter (in 1923 only 252); though the yearly total of summary convictions approaches 500,000. Appeals to the King's Bench average under a dozen by *certiorari* and under ninety by case stated; about half being unsuccessful. There is barely one appeal to Quarter Sessions for every thousand convictions. Doubtless considerations of expense have much to do with this; yet, even after allowing for them, these statistics, coupled with the further fact that less than half (in 1923 less than a third) of the appeals to Sessions are entirely successful, afford noteworthy evidence of the satisfactory working of our courts of summary jurisdiction. Further proof is given by the fact that it is rare now for a borough to ask for the creation of a stipendiary magistracy; and by the further fact that six-sevenths of the persons accused of indictable offences shew their confidence in Petty Sessions by asking to be tried there instead of before a jury. After close personal observation of our English police-courts, a learned French lawyer, the Comte de Franqueville, came to the conclusion that "il est difficile d'imaginer une organisation plus simple, plus pratique, plus prompte, ou plus humaine" (*Le Système judiciaire de la Grande-Bretagne*, II. 710). An advocate once prominent as a defender of prisoners says: "I had very great experience with country Benches. I am bound to say that, as a rule, very little fault could be found with the manner in which they did their work" (Montagu Williams' *Leaves of a Life*, II. 208). Lord Birkenhead said in 1921: "The work done in this country by justices of the peace is, on the whole, done most efficiently. The amount of care and attention given to their work by lay magistrates in this country is extraordinary."

CHAPTER XXX

ORDINARY PROCEDURE

I. PRELIMINARY STEPS

FROM the modern and purely statutory form of procedure which prevails in courts of summary jurisdiction, we now pass to the more ancient form which prevails in those courts where offenders are tried in the common-law manner, that is to say, by a jury. In this procedure—still styled “ordinary,” though now far rarer than the summary—there are ten possible stages which call for explanation. These are:—1. Information; 2. Arrest; 3. Commitment for trial; 4. Prosecution, *i.e.* Accusation; 5. Arraignment; 6. Plea and issue; 7. Trial and verdict; 8. Judgment; 9. Reversal of judgment; 10. Reprieve or pardon.

During the greater portion of the history of English criminal law its provisions for the detection and arrest of offenders were¹, as we have said², very defective. In the earliest times, indeed, excellent provision had been made by the system of Frankpledge³. A frankpledge was a group of adult males—sometimes all those within a particular township, sometimes only a “tithing” or group of ten, selected individually—who were liable to amercement if they did not surrender to justice any one of their number who committed a crime (each individual in the group is sometimes also called a “frankpledge”). This institution apparently only existed south of the Humber; but probably arose there as far back as the Anglo-Saxon period. From at least the time of Henry I. a “view of frankpledge” was taken by the sheriff periodically, at which the above-mentioned amercements were collected. After the frankpledges fell into decay in the fourteenth

¹ “In 1800, in no department of English government was inefficiency so pronounced as in that of police”; W. L. M. Lee’s *History of Police*, p. 214.

² *Supra*, pp. 29, 282.

³ Pollock and Maitland, i. 568.

century, England possessed no effective machinery for arresting criminals or for preventing the commission of crime, until the creation, by Sir Robert Peel's energy, of the modern police force. Even in London, as is stated in the preamble to his Act of 1829, "the local establishments of nightly watch and nightly police were found inadequate to the prevention and detection of crime, by reason of the frequent unfitness of the individuals employed, the insufficiency of their number, the limited sphere of their authority, and their want of connection and co-operation with each other." But since the successive establishment of metropolitan, borough, and county police-forces¹, the detection of offenders is so efficient that in some fifty-five² per cent. of the known cases of indictable crime, a prosecution takes place; and some six-sevenths of these prosecutions succeed³.

Rewards are no longer offered officially for information. They are now discredited as creative of false testimony and as impairing the weight of true.

1. *Information.*

Every justice of the peace has by his commission the duty of "conserving the peace" by taking active steps to exact securities from suspected persons, to suppress riots, and to apprehend offenders. These duties he still actively exercises (though the judges of the King's Bench Division, on whom also they are conferred, have long ceased to do so, regarding as more constitutional a differentiation of function which keeps the judicial office apart from all the strictly executive work of government).

Hence in ordinary procedure, just as in summary, the first

¹ There are now some 60,000 constables; making 186 Forces.

² Before the Great War the proportion was as high as sixty-five; but now the number of policemen is diminished, whilst their time is largely diverted to non-criminal duties, e.g. with regard to street traffic and cattle-disease.

³ "Forty years ago," said Sir C. Mathews in 1912, "it was an every-day occurrence for defendants' counsel, when there was no defence, to attack the credit of the policemen witnesses. To-day this practice has become almost obsolete."

step usually is to lay an "information" before a justice of the peace¹. It may be laid by any person who is aware of the facts, whether or not he be the person aggrieved. It usually is not technically necessary that it should be in writing or be upon oath. But unless both these formalities are observed, the justice can only issue a summons to the accused to attend, instead of a warrant for his arrest.

2. Arrest.

Where there is good ground for supposing—as, for instance, from the gravity of the charge—that a mere summons would not suffice to secure the attendance of an accused person, he should be arrested², in order to bring him before a magistrate. On accusations of indictable offences, a warrant is sometimes obtained—only in about ten per cent. of the arrests for such crimes—in order to authorise the arrest. But the cases in which arrest is legally permissible, without any such special authorisation, are numerous (see p. 448 *infra*).

I. Special authorisation for arrest always takes in modern times the form of a written warrant³. This may be issued in cases of political crime by a Secretary of State or any other Privy Councillor; or, in any criminal case whatever, by a judge of the King's Bench Division or (as usually happens) by a justice of the peace⁴. It authorises the person executing

¹ *Supra*, p. 437. The justice may belong either to the district where the offence was committed or even (unlike Summary jurisdiction) to that where the offender is. Do not confuse such informations with the far rarer and more formal "informations" by officials of the Crown, which are a substitute for indictments; *infra*, p. 460.

² See Pollock and Maitland, *Hist. Eng. Law*, II. 582.

³ In early times (Pollock and Maitland, II. 578) it was the duty of anyone who discovered that a grave crime had been committed to raise orally a "hue and cry" (*hue* is an exclamation of pursuit, akin to *hoot*). This gave to all taking part in it the same powers of arrest as a written warrant now-a-days would.

⁴ If issued by an ordinary justice of the peace, it formerly could only be executed within the district to which his commission extended; though it could be executed in any other district as soon as it had been "backed" by any justice commissioned there. But now, by the Criminal Justice Act, 1925, s. 31 (3), any warrant lawfully issued by a justice to compel the

it to arrest the person therein described¹. When executing the warrant, he (by the Criminal Justice Act, 1925, s. 44) need not now have it with him. Since the charge is not a civil but a criminal one, he is allowed to break open even the outer doors of a house if he cannot otherwise seize the person who is to be arrested (*e.g.* if those in the house will not give him up). If the charge be one of treason, violent felony, or dangerous wounding, he may, moreover, use any degree of force that may be necessary to effect the arrest, or prevent the escape², of the accused; even to the infliction of wounds or death upon him. If, on the other hand, the accused should kill the arrestor he will be guilty of murder². But if a constable attempts to arrest offenders illegally (*e.g.* on a void warrant) they will be guilty only of manslaughter if, in resisting such an arrest, they kill the constable.

II. Even when no warrant has been issued, the common law often permits an arrest to be effected; a permission accorded not only to a constable but even to private persons. The power has been further extended by modern statutes, especially in the case of constables.

(A) A private person, without any warrant, may arrest

appearance of a witness, or to apprehend a person charged with an offence (whether punishable on indictment or summarily) may be executed in any place in England or Wales, although outside the jurisdiction of that justice.

Whenever, in such a manner, a warrant is executed outside the district of the justice who issued it, the accused is usually taken back to be examined in that district. But it is permissible for him to be instead brought before some justice of the place of his arrest (11 and 12 Vict. c. 42, s. 11); though, even then, the trial at the Assizes or Sessions will usually take place in the district where the warrant was originally issued.

¹ The justice may endorse on it a direction to the police to admit to bail in sums specified; C. J. A. Act, 1914, s. 21 (1).

² For in *felonies* Flight is tantamount to Resistance. But if the warrant were only on a charge of *misdeemeanor*, though it would equally be murder to kill the arrestor (Foster, p. 311), yet the arrestor would not be justified in killing the accused man merely to prevent his flight. Should, however, the misdeemeanant actually resist arrest, the arrestor will be justified in counteracting this resistance by any necessary force, even fatal; *i.e.* he may, and must, stand his ground, instead of first trying to avoid a conflict in the manner that the law requires (*supra*, p. 107) in cases of Chance-medley.

(i) Any person who, *in his presence*, commits a treason or felony or dangerous wounding. The law does not merely permit, but requires, the citizen to do his best to arrest such a criminal¹. And as he is thus acting not only by a right but under an imperative duty, he may break outer doors in pursuit of the criminal. And for a treason or a violent felony he may use whatever force is necessary for capturing the offender, as, for instance, shooting at him, if he cannot otherwise be prevented from escaping; so that if the felon's death results, the case will be one of justifiable homicide.

(ii) Any person whom he reasonably suspects² of having committed a treason or felony or dangerous wounding, provided³ that this very⁴ crime has been actually committed by some one (whether by the arrested person or not). But in this case, as also in all the statutory ones about to be mentioned, the law, though permitting a mere private person to make an arrest (and so making it murder for a guilty man to kill him by resisting it), does not command him to do so; and hence confers no *general* right to effect it by breaking into a house or by using blows or other violence⁵.

(iii) In addition to these two common-law powers, modern statutes permit any private person to arrest anyone whom he "finds"⁶ (α) signalling to a smuggling vessel⁷; or

¹ 2 Hawkins P. C. c. 12, s. 1. Besides this power to arrest, with a view to permanent detention, a person who actually has committed grave crime, every private citizen has also the right to prevent such crimes, by seizing any man who is *about* to commit a treason or felony or even a breach of the peace, and detaining him *temporarily*, until the danger is over.

² A felony *unknown* to him will not justify arrest; 3 C. & K. 149.

³ This proviso is mentioned so early as Y. B. 9 Edw. IV. fo. 26 b.

⁴ See an interesting case, *Walters v. Smith*, L. R. [1914] 1 K. B. 595. Though the mistake does not justify the arrest, it may defeat any action for malicious prosecution.

⁵ *I.e.* the private person will be justified for arresting the suspected felon, even by fatal violence, if the suspicion be correct; but an *innocent* man is not bound to submit to a private arrestor, so a killing, by either of them, would be a Manslaughter.

⁶ Accordingly, if the offender has completed the offence, even though he has gone "but a single yard" away before detection or even before apprehension, it is too late to arrest him.

⁷ 39 and 40 Vict. c. 36, s. 190.

committing any offence under (β) the Vagrancy Act¹, (γ) the Larceny Act, 1916², or (δ) the Coinage Offences Act, 1861³; or (ϵ) committing *by night* any indictable offence whatever⁴;

(iv) or, if the arrest be authorised by the owner of the property concerned, anyone whom he finds committing any offence against (α) the Malicious Damage Act, 1861⁵, (β) the Night Poaching Act⁶, (γ) the Town Police Act⁷, or (δ) the Metropolitan Police Acts⁸.

(B) A police constable, even when acting without a warrant, has powers still more extensive than those of a private person. Moreover, as his official position renders it in all these cases a duty⁹ for him to make the arrest, it will, in any of them, be a duty, even for an innocent person, to submit to him and not resist arrest¹⁰. He is entitled to call for the assistance of any able-bodied bystander, if necessary; L. R. 1 C. C. R. 20.

(i) Like a private person he may arrest anyone who commits, in his presence, a treason, or felony, or dangerous wounding; and may break doors or use fatal violence if necessary¹¹.

(ii) (Unlike a private person¹²) he probably may arrest, for *permanent* detention, anyone who, in his presence, commits even a mere breach of the peace¹³.

¹ 5 Geo. IV. c. 83, s. 6, *supra*, p. 324.

² Sec. 41 (1) (except extortion by libelling). Or any one offering stolen goods for sale or pawn; s. 41 (2).

³ 24 and 25 Vict. c. 99, s. 1.

⁴ 14 and 15 Vict. c. 19, s. 11.

⁵ 24 and 25 Vict. c. 97, s. 61.

⁶ 9 Geo. IV. c. 69, s. 2.

⁷ 10 and 11 Vict. c. 89, s. 15.

⁸ 2 and 3 Vict. c. 47, s. 66, and c. 71.

⁹ But for him to assist a householder in ejecting an intruder, though a kindly act, is no part of his duty; for a mere trespass is no crime. Hence if the intruder resist him, it will be only a common assault, not an assault "on a constable in the execution of his duty."

¹⁰ But as to *needless* handcuffing, see p. 155 n. *supra*. And until the arrested person has been actually charged, his finger-prints cannot be taken without his consent.

¹¹ Yet in firing at an escaping felon, he will do well to send his first shot into the air and to aim his second one low.

¹² *Supra*, p. 449 n. 1.

¹³ 1 Hale P. C. 587; 2 Hale P. C. 90. But see East P. C. c. 5, s. 71.

(iii) He may arrest anyone whom he reasonably suspects¹ of treason, or felony, or dangerous wounding, whether (unlike the restriction on such arrest by a private person) the crime has *actually* taken place or not²; *e.g.* because he finds a man hurrying away and carrying housebreaking tools. It would seem that in these arrests also he may use any necessary violence even though fatal³, and may break outer doors; but some authorities limit these powers to cases where the crime has actually taken place⁴.

(iv) Like a private person, he may arrest in the five cases in (A) (iii).

(v) And, even *without* any authorisation of the owner of the property, in the four cases enumerated under (A) (iv).

(vi) He may arrest any person loitering at night in a highway or yard, whom he reasonably suspects of having committed, or even of being about to commit, a felony against the Larceny Act, 1916, the Malicious Damage Act, 1861, or the Offences against the Person Act, 1861⁵.

(vii) In *London*⁶ a constable may also arrest (*α*) any person reasonably suspected of having committed, or even about to

¹ A constable at Queenstown had more than fifty times questioned and arrested persons, when about to sail for America, "purely on suspicion, without any information," yet had not once been mistaken; C. C. C. Sess. Pap. CXLVII. 103.

² *Lawrence v. Hedger*, 3 Taunton 13; *Beckwith v. Philby*, 6 B. and C. 635. These cases shew that the constable's privilege, where the supposed crime has not in fact taken place, extends to cases where he acts merely on his own suspicion, without any third person having made the charge. As to its being murder for the supposed felon to kill the constable, even where no felony has actually taken place, see *Rex v. Woolmer*, 1 Moody 334.

³ This power to use violence in arresting felons extends also to the preventing of their escape. Hence convicted prisoners who are felons can, under armed supervision, be employed over a wide range of land (as at Dartmoor) in out-door labour; a coveted advantage not so open to misdemeanants, for the risk of their successful flight would be great.

⁴ See the Children Act, 1908, s. 19, for a constable's power to arrest persons reasonably suspected of offences involving bodily injury or other cruelty to a person *under sixteen*.

⁵ Ss. 41 (3), 57, and 66 of these Acts.

⁶ 2 and 3 Vict. c. 47, s. 64.

commit, *any* indictable offence; and even (β) anyone loitering at night who cannot give a satisfactory account of himself.

As a person who arrests another without waiting to obtain a warrant usually does so because he must act instantly, if he is to act at all, the law on the subject ought to be clear and simple. But as the foregoing summary sufficiently shews, modern legislation has rendered it highly complicated, and (to use the words of a very learned writer) "most unsatisfactory and—to private persons—almost a snare¹."

3. Commitment for Trial².

Of the persons who appear before justices of the peace, for preliminary examination upon charges of indictable crime, about thirty per cent. come in mere obedience to a summons³. The others are brought up in custody; say, about ten per cent. under warrants, and about ninety per cent. after being arrested without a warrant⁴.

As the summons or warrant is merely a process to secure appearance, the justice must take cognizance of *any* information laid against the defendant when before him (even upon an illegal arrest), and may commit him for trial thereon⁵.

A preliminary examination (unlike most of the summary hearings) never requires the presence of more than a single justice⁶. There is full power of compelling the attendance of witnesses⁷, either by summons or (if necessary) by warrant;

¹ Mr C. S. Greaves, Q.C.; *Criminal Law Consolidation Acts* (p. 188).

² Study in detail ss. 12, 13, 14 of the Criminal Justice Act, 1925.

³ But of persons tried for non-indictable offences, near eighty per cent. appear on mere summons, about twenty per cent. on arrest without warrant, and only two per cent. under warrants.

⁴ A person arrested without a warrant may be—and, if it is impracticable to bring him before a justice within twenty-four hours, *must* be—released on bail by the officer in charge of the police station, unless he thinks the offence serious; Criminal Justice Act, 1925, s. 45.

⁵ *Rez v. Hughes*, L. R. 4 Q. B. D. 616.

⁶ And even if there be two or more they are not a "Petty Sessional Court"; since *it* sits only for summary jurisdiction. The six months limit (p. 434) does not apply to these Examinations.

⁷ And production of documents, etc. Cf. p. 435 n. 7, *supra*. But until an actual prosecution has begun, a justice has no power to summon any one

and if, on appearing, they refuse to give evidence, the justice may commit them to prison for a week or until earlier submission. At common law the accused could not, as a right, demand the assistance of an advocate, nor could the public insist upon admission¹. And it would seem² that this rule still holds good, in spite of the wide general language in which recent statutes³ have required justices to act "in open court"; which, however, must be interpreted as restricted to cases of summary jurisdiction alone. The practice, followed in some rare cases, of communicating only in writing the names and addresses of particular witnesses, and forbidding the accused to put any questions about them openly, is justifiable only in this view of the proceedings as not being necessarily public.

It must be noted that at these preliminary inquiries the presence of the accused is absolutely essential⁴.

The preliminary examination is conducted as follows. The prosecutor "opens his case" by any necessary explanation. Then his witnesses are examined in chief, cross-examined, and re-examined; their evidence being taken down in writing at the time by the clerk to the justices. The Crown witnesses having been heard, and their evidence summed up⁵ by the prosecutor (if he wishes), the examining justice (or his clerk for him) then reads the charge to the accused, explaining its nature. He then asks him if he has anything to say; telling him he need not say anything unless he likes, and has nothing to hope or fear from any promise or threat, and that

to come and afford information. The police have to pursue their inquiries as best they can.

¹ Cf. 11 and 12 Vict. c. 42, s. 19.

² *Boulter v. Justices of Kent*, L. R. [1897] A. C. 556. A contrary view was at one time taken by the law officers of the Crown.

³ *E.g.* 42 and 43 Vict. c. 49, s. 20 (1); 52 and 53 Vict. c. 63, s. 13 (11).

⁴ 11 and 12 Vict. c. 42, s. 17. Contrast the power given to justices in their summary proceedings to try a defendant in his absence for petty offences, if he fails to appear when summoned; *supra*, p. 438 n. 1.

⁵ *Oke's Magisterial Synopsis*, p. 887 (contrast p. 436 *supra*). Any adjournment of the proceedings must be for not more than eight clear days; unless both prosecutor and accused consent to a longer one. Contrast summary proceedings; there there is no such limit of time.

whatever he says will be taken down and may be used at his trial¹. He also asks whether he wishes to be sworn and give evidence; and whether he wishes to call witnesses. The defendant may either remain silent (a frequent course, but for an *innocent* man a most unwise one²); or leave it to his advocate to make a statement, or himself make one. If he do make a statement it is taken down in writing and afterwards read over to him and signed by one of the examining justices. After this, the prisoner's witnesses³, if any, are examined, cross-examined, and re-examined; and their evidence is taken down in writing. The "deposition" of each witness, on either side, is read over, to him and the accused, at (by the Act of 1925) the end of *his* examination; and is signed by him and by the justice⁴. Even if the accused call witnesses, the prosecutor's advocate has no second speech.

The examining justice (or, if there be more than one, the majority) must then determine (1) whether or not there is a strong enough case to justify committing the accused for trial⁵; and (2) if so, where that trial is to be. If the offence is

¹ The old final words "against you" are omitted. But it is only *against* him that this statement is evidence; so it is for the Crown to determine whether or not to put it in at the trial. But it is usual to put it in. It is prudent to do so, for it may become important to the Crown as contradicting evidence given subsequently for the prisoner; and also kind, for to make prisoner put it in would give the Crown the final speech. What the prisoner said before the magistrates is not evidence unless the prosecutor make it so; but if he do, it then becomes evidence for the prisoner as well as against him, *i.e.* *all* parts of it are evidence.

² "The sooner an innocent man discloses his defence, the better for him"; Lord Alverstone, L.C.J. "It is astounding that solicitors should expose innocent clients to such risk as is involved in reserving the defence"; Low, J. See also Wills, J., in 67 J. P. 396.

³ By the Criminal Justice Act, 1925, s. 12 (5), the prisoner's solicitor or counsel speaks (a) *before* him and his witnesses, should he call any; but (b) *after* prisoner's own evidence (if any) should he call no witnesses.

⁴ In a case at the C. C. C. in November 1922 (*Rex v. Bevan*) the depositions filled 320 pages.

⁵ If they dismiss the charge, this does not bar a subsequent accusation before some other justice. Should they think the charge not merely groundless but malicious, the Costs Act, 1908, empowers them to make the prosecutor pay costs.

one which Quarter Sessions are competent to try¹, the case must be sent thither², unless there are special reasons for preferring a trial at the Assizes³. Again, (3) if the accused ask to be released on bail⁴ the court must determine whether this is to be allowed, and, if it be, on what terms. In cases of treason, however, bail cannot be granted by a justice, but only by a Secretary of State or a judge of the King's Bench Division. But in cases of felony the matter is in the justice's discretion. In misdemeanors he had not, at common law, even a discretion (when once the preliminary examination was over), but was bound⁵ to release the accused on his finding adequate bail⁶. But, by statute⁷, he obtained a discretion in those grave misdemeanors for which the costs of prosecution may be charged on the county. As the Act of 1908 (*infra*, p. 494) renders all misdemeanors so chargeable⁸, the discretion seems to be now equally universal⁹.

The Bill of Rights forbids the requiring of "excessive" bail; but justices must use their own judgment as to what

¹ *Supra*, p. 430.

² Assizes Relief Act, 1889 (52 and 53 Vict. c. 12). "The mere fact that the Assizes come before the Sessions is not a sufficient 'special reason'"; Avory, J. (June 1925).

³ The Criminal Justice Act, 1925 (s. 14) provides that, instead of being committed to the Assizes or Quarter Sessions of the normal locality, he may be sent to the like court of another locality, for greater convenience either in time or in place, or for greater economy.

⁴ This word means properly (1) the contract whereby the man is "bailed" (i.e. delivered) to his surety, but is also applied to (2) that surety himself. Either the justice or the surety may be spoken of as "bailing" the man. Such sureties were vividly described in the thirteenth century as "a living prison" (Pollock and Maitland, II. 589). Even now-a-days the surety, if he should desire to discharge himself, is allowed to arrest the defendant (and even to break into his house for the purpose) that he may give him back again into the custody of the court by which he was bailed.

⁵ The current but anomalous view that the K. B. D. judges are *still* so bound was negatived in *Rex v. Phillips*, 38 T. L. R. 897.

⁶ *Supra*, p. 96.

⁷ 11 and 12 Vict. c. 42, s. 23.

⁸ Except mere quasi-criminal ones as to roads and bridges.

⁹ By C. J. A. Act, 1914, s. 23, justices who do not grant bail to a misdemeanant must tell him of his right to apply to the K. B. Division for it.

sum is adequate without being excessive¹. Here, as also in exercising their discretion about admitting to bail at all, they have simply to consider what likelihood there is of the defendant's failing to appear for trial². That likelihood will be affected by (1) the gravity of the charge³; (2) the cogency of the evidence; (3) the wealth of the offender (which renders him both more willing to bear the forfeiture of bail and less willing to bear the disgrace of a conviction); (4) whether the proposed sureties are independent or are likely to have been indemnified by the accused⁴; and (5) the probability of the accused tampering with the Crown's witnesses, if he be at large⁵. But experience shews that, on the whole, very few persons admitted to bail fail to appear for trial⁶. Hence of recent years the judges have urged⁷ magistrates to grant bail very readily; and (especially if the offence is a small one and the day of trial is distant) to accept the recognizances of the accused himself, even without any sureties, unless they see grave reason to think that he will not appear for trial if left at large.

¹ In 1925 three London bankers, accused of fraudulent conversion, had to give bail in £10,000 each.

² The importance of release on bail was great even as late as the seventeenth century. There was no provision of adequate food for prisoners awaiting trial. Hence, 19 Car. 2, c. 4 recites that "they many times perish before their trial."

³ Bail has occasionally been allowed even on charges of murder; as where the circumstances pointed to a verdict of justifiable homicide.

⁴ *Reg. v. Butler*, 14 Cox 530. All arrangements, between a person bailed and his sureties, that if he abscond he shall indemnify them for the bail forfeited, are so contrary to public policy that they are void as agreements; and moreover are indictable as conspiracies to pervert the course of justice, even though no intention to pervert it be alleged (*Rex v. Porter*, L. R. [1910] 1 K. B. 369). But as to surety's expenses, see 16 C. B. 614.

⁵ Hence bail is less readily granted during a preliminary inquiry, when the depositions have not yet been completed, than after its conclusion. During the preliminary inquiry a magistrate has power to remand the accused in custody for a period not exceeding eight days, by warrant; and for three days, by a verbal order (11 and 12 Vict. c. 42, s. 21).

⁶ In 1927, of the 7242 persons committed for trial, only 4084 were sent to prison. Three-sevenths, 3158, thus were bailed; of whom only 29 absconded.

⁷ The need of such injunctions is shewn by the fact that many persons sent to prison to await trial are ultimately acquitted; (yet not necessarily innocent, cf. p. 485 n. 5, *infra*).

It will further be the duty of the justices to transmit to the court where the trial is to take place the depositions of the witnesses and the prisoner's statement; of which we have already spoken¹. The depositions are important for several purposes. (a) They enable the opposite party to check the evidence given at the trial, and to cross-examine or contradict a witness whose evidence there varies from that which he gave at the commitment. (b) They form a substitute² for the witness in the event of his being, at the time of the trial, either dead or too ill to travel³ or to give evidence⁴. But his absence abroad does not suffice to render them admissible⁵. (c) They assist the draftsman who has to frame the indictment. (d) They enable the judge to learn the difficulties of the case before he charges the grand jury. And (e) they inform the defendant as to the precise case which he has to meet⁶. To him⁷ this is obviously an advantage, and it is often an advantage to the public, for if the case thus disclosed be a strong one, the defendant is the more likely to plead guilty. It is, however, to be regretted that our law does not take some measures for securing a reciprocal disclosure of the intended defence. At present it is too easy for him to raise at

¹ Moreover, committing justices may now, by 3 Edw. VII. c. 38 (*infra*, p. 459), provide legal aid, at the public cost, for any *poor* prisoner whose defence is so complex that he needs legal aid.

² Being a legally-required official record they are the "best evidence" (*supra*, p. 366) of what passed at the committal; and cannot be altered by oral evidence. Indeed oral evidence is probably not admissible even merely to supplement their omissions, when they are used as "substantive evidence" (*i.e.* as a substitute for an absent witness); though it is when they are used to contradict a witness who does appear. C. C. C. Sess. P. XLVI. 915.

³ 11 and 12 Vict. c. 42, s. 17.

⁴ *Reg. v. Wicker*, 18 Jur. 252.

⁵ Except by consent, in cases of misdemeanor; perhaps. *Supra*, p. 397.

⁶ Hence *he* has, after commitment, a statutory right to purchase copies of them at 1½d. per ninety words (11 and 12 Vict. c. 42, s. 27); before commitment 6d. is charged. But the witness has no such right; and indeed ought not to be supplied with a copy.

⁷ As was said by Jessel, M.R., in *Benbow v. Low* (L. R. 16 Ch. D. 95): "If you give one party the opportunity of knowing the particulars of the evidence that is to be brought against him, you give a rogue an enormous advantage." Hence in civil proceedings, the defendant, though entitled to know the nature of the claim against him, is not entitled to know by what evidence it will be supported (*Lever v. A. N. Ltd.*, L. R. [1907] 2 K. B. 626).

the trial some speculative defence, which there is then no opportunity of contradicting, and to support it by witnesses about whom it is too late to make inquiries. The facility has become greater now that the prisoner himself is allowed to come forward as a witness.

The justice, having already bound over each witness (on signing his deposition) to appear at the trial, now binds over some one, usually a policeman, to prosecute, *i.e.* to prefer a bill of indictment before the grand jury. He may commit to prison anyone who refuses to be thus bound over to give evidence at the trial¹. Witnesses and prosecutors are only bound over in their own recognizances; though defendants, as we have seen, are usually required to find one or two sureties also. "A recognizance," says Blackstone², "is an obligation of record, which a man enters into before some court of record, or magistrate duly authorised, with condition to do some particular act, as, to keep the peace." Although the magistrate's court is not a court of record, yet its records are, in this respect, on the same footing as those of the higher courts³. It is a contract not by parol nor by deed, but of record⁴; since, so soon as it is actually enrolled, the record of the court is conclusive evidence as to its existence and terms, and often is the only evidence of them. For the party bound need not sign anything (though in some courts he does); but may merely assent orally to the court's oral question. His assent consists in an admission of his owing to the Crown some specified sum of money to be payable unless a specified condition be fulfilled; *e.g.* unless he appear at the next Assizes. Unlike other contracts (which have to be sued upon) recognizances admit of direct enforcement. For, if the condition be not fulfilled, the recognizance may at once be "estreated"; *i.e.* an extract (Norman-French, *estrait*) shewing the terms of the obligation

¹ 11 and 12 Vict. c. 42, s. 20.

² 4 Bl. Comm. 341.

³ See Brooke's Abridgement, tit. *Recognizance*; pl. 8.

⁴ Anson on Contracts, part II. ch. IV.; Chitty on Contracts, ch. I. s. 2.

is copied from the court's record, and is sent to the clerk of the peace; who thereupon directs the sheriff to levy the amount upon the defendant's goods¹.

A useful innovation has been made by the Criminal Justice Act, 1925, s. 13, with regard to witnesses whose evidence seems likely to be unnecessary at the trial, either as being covered by the admissions of the accused or as being merely formal. They may be bound to attend the trial conditionally only; *i.e.* only if they receive from the prosecutor or the accused a notice to attend. Non-attendance will enable their depositions to be read, if notice has *not* been given; s. 13 (3) and (4).

Finally the court may, in fit cases, assign to the accused a solicitor and a right to a counsel, under the Poor Prisoners' Defence Act, 1903². The solicitor will select the counsel.

¹ 3 Geo. IV. c. 46, s. 2. See *Reg. v. Smith*, 17 Cox 601, as to the difficulty of effectually binding an infant by recognizances, because of his incapacity to contract.

² 3 Edw. VII. c. 38. It authorises justices of the peace, upon committing a prisoner for trial, to certify that a solicitor and a counsel ought to be assigned to him, and the expenses of his defence defrayed out of public funds. Or a similar certificate may, instead, be given subsequently, at any time after reading the depositions, by a judge of the assize, or the chairman of the quarter-sessions, at which he is to be tried.

But this power is only to be exercised where (1) the prisoner has not "reserved his defence" (cf. p. 454) but has set up before the committing justices some defence which is of such a nature as to render it "desirable in the interests of justice" that he should have legal aid in preparing and conducting his defence, and at the same time (2) he is too poor to obtain such aid at his own expense. A complex alibi is, for instance, such a defence as calls for the application of the Act.

The chief value of the Act lies in its providing a solicitor; for it has long been the practice of the judges, if they find the prisoner to be undefended in any case of exceptional difficulty or gravity, to ask some counsel to undertake his defence. Since the Act, however, such a counsel usually receives a fee, under an order signed by the judge.

CHAPTER XXXI

ORDINARY PROCEDURE

II. FROM ACCUSATION TO SENTENCE

4. *Prosecution.*

THE process of commitment by a justice of the peace which we have described, though in actual practice it is adopted in almost every instance, is not legally essential¹ for bringing an accused person to trial before a jury² (except in the few crimes to which the Vexatious Indictments Act³ applies). All that is truly essential is some mode of "Prosecution," *i.e.* of formal accusation. Such an accusation may be made either (1) by a crown official's Information, or (2) by a jury's Presentment.

(1) An *Information* is a written complaint made on behalf of the Crown by one of its officers and filed in the King's Bench Division. Since such a mode of accusation dispenses with any accusing jury, and with any examination before a justice of the peace, it is only allowed in cases of misdemeanor. The Attorney-General has the right, *ex officio*, to file informations at his own discretion, but it has become practically obsolete⁴. The other official who can file them is the Master of the Crown Office; but he can only do it after obtaining an express permission from the King's Bench Division, and such permission is rarely asked for. It is never granted unless the misdemeanor is of a peculiarly pernicious character.

¹ Yet very important; for there is no legal machinery by which witnesses can be compelled to appear before the grand jury to support the accusation, if they have not been bound over by a committing justice to appear and to give evidence.

² Thus occasionally when a coroner's inquest has occupied an unusually protracted time, the magisterial inquiry is omitted; as in the case of Paine (*The Times*, Feb. 25, 1880), who was indicted for a remarkable manslaughter (by plying with intoxicating liquor) without being taken before a magistrate, the coroner's inquest having lasted five days.

³ *Infra*, p. 471.

⁴ But in 1911 one was filed against Mylius for libelling the King; see p. 316 n., *supra*.

Thus informations are not to be filed for libels unless the prosecutor was attacked in some official capacity, or in outrageous terms. Cf. *Ex parte Bowen*, 27 T. L. R. 180 (assault by police). They are tried at the *civil sittings*.

(2) A *Presentment*¹ is a written accusation of crime presented on oath by a coroner's jury² or a grand jury. If the accusation has been laid before the grand jury by some prosecutor, their presentment then obtains also the more specific name of an *Indictment*. Practically every case that comes to a petit jury for trial comes on Indictment. But grand juries were suspended temporarily during the late War; and mere commitment for trial then enabled the clerk to present an indictment³.

In Saxon times Ethelred the Unready enacted the Law of Wantage: "Let a moot be held in every wapentake; let the twelve senior thegns go out, and the reeve with them; and let them swear on a relic that they will accuse no innocent man nor conceal any guilty one⁴." But the most recent authorities⁵ doubt both the permanence and the generality of this law; and consider the consecutive history of our modern grand juries to go back only as far as A.D. 1166. In that year Henry II. prescribed, in the Assize of Clarendon, a very similar procedure; probably taking it, not from the Anglo-Saxon precedents, but from the Frankish inquests as adopted in Normandy. The ordinance of Henry II. required twelve knights, or other freemen, of every hundred, and four men (who would probably be *unfree*) of every township, to send in

¹ The term is also often used in a narrower sense, in which it is limited to cases where a grand jury speaks from its own personal knowledge (e.g. accusing persons who are responsible for the obvious non-repair of some well-known highway). Such presentments are now-a-days extremely rare. They are, however, interesting as survivals of the grand jury's ancient function of *initiating* accusations.

² *Supra*, p. 431.

³ By the Criminal Justice Act, 1925, s. 19, he is again enabled to do so at any *Quarter Sessions* at which all the persons for trial have, on commitment, admitted their guilt; and there will be no grand jury.

⁴ Stubbs' *Select Charters*, part II.; *Constit. History*, I. 611.

⁵ Pollock and Maitland, I. 442; II. 642. Holdsworth, I. 12.

accusations of murder, robbery, larceny, and harbouring of criminals. In 1176 arson and forgery were added¹.

At the present day a grand jury may consist of any number of persons from twelve to twenty-three, but twelve must agree upon any presentment². There is no property qualification for grand jurors at Assizes; and women are now eligible.

The grand jury was, as we have seen, established in order to multiply accusations of crime. By a curious inversion its present function is that of revising, and thereby diminishing, such accusations; though the old form of oath remains, viz. "You shall present all matters touching your present service that may come to your knowledge." The grand jury hear the witnesses for the prosecution (or so many of them as they desire)³. But no counsel are present to conduct the examination; or to guard against the possibility of the bill's being ignored through some misapprehension of law. It is not usual for the grand jury to have the depositions before them; so the examination takes place with no clue to the facts to be elicited. Moreover it is conducted in private, without a note of it being made beyond the mere name of each witness examined, and all the grand jurors are under an oath of secrecy. There is thus little check upon any untruthful witness. Moreover the grand jury never see either the defendant or his witnesses. Thus the sole function of a modern grand jury is to repeat badly what has already been done well: to hear in secret, imperfectly, and in the absence of the accused, one side of the case⁴, after both sides of it have

¹ Stubbs' *Select Charters*, part iv. These ordinances came to fix a line between felonies and mere "trespasses," i.e. misdemeanors (*supra*, p. 98).

² Cf. the similar rule which applies in the court of the Lord High Steward (*supra*, p. 424); and to juries on lunacy inquiries (53 and 54 Vict. c. 5, s. 97), and at coroners' inquests (50 and 51 Vict. c. 71, s. 3). Even on the petit jury, unanimity was not required until 41 Edw. III.

³ But if the accused *admitted* his guilt to the examining justice, the grand jury are now required to return a true bill *without* hearing any witnesses (10 and 11 Geo. V. c. 81, s. 4). See also p. 545, *infra*.

⁴ Of the bills laid before them, grand juries ignore about two per cent. But the inquiries made in 1859 by the then Lord Chancellor led him to the

already been heard fully in open court, and with full opportunity of legal aid. A bad tribunal is laboriously and expensively brought together, in order to revise the work of a better one¹.

The written accusation laid before a grand jury is called a "bill of indictment²." They may "ignore" it; though this will not prevent the same accusation from being presented to some later grand jury. If, on the other hand, they find it a "true bill," it then becomes an "Indictment." Sir Matthew Hale, under Charles II., described an indictment as "a plain,

conclusion that even at the Central Criminal Court more than half the bills ignored ought to have been tried. See Hansard, March 10, 1859.

¹ The Royal Commission on Delay in the K. B. Division reported (*The Times*, December 16, 1913) in favour of the abolition of grand juries, both at assizes and at sessions. Their suspension during the war produced no complaint; and saved much expense (e.g. in the metropolitan police district alone more than £10,000), relieving many witnesses from an extra day's attendance.

Those who still defend the retention of the grand jury rely chiefly upon the following arguments. (1) That it affords to some country gentlemen useful (though brief) legal experience; and by their presence adds to the dignity of the court. (2) That there ought to be some means by which to bring to trial political offenders whom magistrates have declined to send to it. (But as to the oppressiveness of this particular means, see p. 470 *infra*.) (3) And that, on the other hand, the grand jury, being more independent of the Crown than a justice is, will be more prompt to dismiss any groundless prosecutions for political offences in the very rare occasion of such prosecutions. (4) That a more emphatic assurance of innocence is afforded if an accusation is ignored before anything beyond the accuser's side of the case has been heard. This fourth argument assumes, somewhat questionably, that innocence is more clearly demonstrated by acquittal upon a secret and imperfect hearing of the prosecution, than by acquittal upon a public hearing of the defendant's vindication of himself. "I should have directed you to ignore the bill, as there is no evidence to sustain it; but, that the defendant may clear his character, I recommend you to return a true bill" (Bailhache, J., in *Rex v. Welton*, Oxford Assizes, October, 1915). As Lord Denman said, "If the grand jury agree with the committing magistrate, they are useless; if they differ from him, they may defeat justice irreparably, and yet they do not clear the character of the accused effectually." De Franqueville pronounces the grand jury "tout au moins inutile" (i. 357); Sir Henry Maine thought it "secret, one-sided, irresponsible...an obstruction to justice" (*Speeches*, pp. 184, 191). In Scotland no grand jury exists, except in Treason; and there appears to be no desire for its establishment. A Scottish indictment is an accusation by the Lord Advocate or the Procurator-Fiscal.

² This is usually drawn on circuits and at the Central Criminal Court by the Clerk of Assize, or of Arraignment, or by the Clerk of Indictments; at Quarter Sessions, by the Clerk of the Peace. See forms of it in the Appendix.

brief, and certain narrative of an offence committed¹." The growth of technicalities soon destroyed both the brevity and the plainness. But, happily, the sweeping alterations introduced by the Indictments Act, 1915 (5 and 6 Geo. V. c. 90) have reduced this portion of criminal procedure to a simple and rational system, making it easier for the accused to defend himself, and harder for him to escape by mere technical objections. An indictment now consists of three parts: (1) the commencement; (2) the statement of offence; (3) the particulars of offence. For examples, see p. 536 *infra*. The Act abolishes the rhetorical "Conclusion" which previously, in some shape or other—*e.g.* "against the peace of our Lord the King, his crown and dignity"—usually terminated indictments, although rendered superfluous by an Act of 1851; cf. the last lines of p. 537.

(1) The *Commencement* states the place of the court's jurisdiction; usually a particular county or borough. At common law, an offence could only be tried by the court within whose jurisdiction it (or a part of it) was committed. Thus in larceny the venue (*i.e. vicinetum*, neighbourhood) may be laid in any county where the accused has had the goods in his possession. The Criminal Justice Act, 1925, s. 11, provided that a person charged with any indictable offence may instead be proceeded against and punished in any place in which he was apprehended, or is in custody, or has appeared to a summons, *on that same charge*, just as if the offence had been committed there; unless this alternative would make him "suffer hardship." (And if a person be charged with more than one indictable offence, *all* may be dealt with in any place where *one* of them could be.) Appeal is allowed.

The form of Commencement prescribed by the Act of 1915 (Schedule I, rule 2) is as follows:

¹ Hale P. C. 169. Yet in charges of treason, conspiracy, or fraud, indictments were often of remarkable length. Thus the indictment in *O'Connell's Case*, in 1844 (5 St. Tr., N. S., 1) was a hundred yards long. In France the indictment of Landru, in Nov. 1921, for murder, took two hours to read aloud!

“The King v. *A. B.*

Hants Quarter Sessions held at Winchester¹

Presentment of the Grand Jury.

A. B. is charged with the following offence [*or offences*].”

(2) Then come one or more² paragraphs; each of which is called a “count,” and describes an offence whereof the prisoner is accused. If there be more than one paragraph, they must be consecutively numbered. Each count is practically a separate indictment.

The *Statement of offence*, with which every count must begin, merely names the crime charged, *e.g.* “Murder,” “Manslaughter,” “Cruelty to a child, contrary to section 12 of the Children Act, 1908.” Under the Act of 1915 it must use ordinary language, avoiding technical terms as far as possible; and need not set out all the essential elements of the offence. But if the offence be a statutory one, the statute and the particular section must be specified in the Statement. (Schedule I, rule 4 (3).)

(3) The *Particulars of Offence* follow, in order to inform the accused as to the circumstances—*e.g.* time, place, conduct, subject-matter—of the crime which has thus been alleged against him. Here, again, ordinary language is to be employed, and the use of technical terms is not to be necessary (Schedule I, rule 4 (4).) The particulars may, too, be very brief; *e.g.* “*A. B.* on the first day of July 1916, in the county of Cambridge, murdered *Y. Z.*” But they must be sufficient to indicate to the accused “with reasonable clearness” (Schedule I, rule 9) the occasion and the circumstances of his crime. This is necessary in order that he may be able to know what defence to offer; and, moreover, may be able, should he blunderingly be prosecuted a second time for this same

¹ Or whatever other tribunal is the “Court of Trial.”

² There were twenty-four counts in the indictment in 1922 of Horatio Bottomley, M.P., for fraudulent conversion. As to the limitation on plurality of counts, see p. 468 *infra*.

misdeed, to protect himself by shewing—see p. 475 *infra*—that the identical charge has already been dealt with¹. Hence if a count be not detailed enough, but too “general,” the judge may quash it; for “generality of accusation is difficulty of defence.” A count, for instance, would be too general if it merely alleged the act of “inciting *A* to commit an indictable offence,” or of “attempting to induce *A* to contravene the law of the land,” without specifying what the particular offence or contravention was. Formerly it was also required that no count should run in the alternative—as by alleging that the prisoner murdered *A* or wounded him; the result being to purchase precision at the cost of prolixity, for a further count was added in order to allege the second of the alternatives. But by the Act of 1915 (Schedule I, rule 5 (1)) in the case of any *statutory* offence which is defined by alternatives—as, for instance, conduct performed with any one of different intentions, or in any one of different capacities, or consisting of doing or omitting any one of different acts—a count may now allege the different alternatives which the defining statute sets out. A good instance is afforded in the Act of 1915 itself: “ill-treated or neglected the said child, or caused or procured the said child to be illtreated or neglected, in a manner likely to cause the said child unnecessary suffering or injury to its health” (Form 6).

To be good, a count should state in the “Particulars of Offence” (i) the party indicted; (ii) the party injured; and (iii) the facts and the intent that are necessary ingredients of the offence. But the Act of 1915 (Schedule I, rules 7, 9), relaxes the precision formerly required in stating them.

(i) The party indicted should be described. But it need only be in such a manner “as is reasonably sufficient to identify him,” without necessarily stating his occupation or abode or even his correct name. And if his name is unknown,

¹ Hence an indictment should not charge a theft of a coat “and other articles”; 17 Cr. App. R. 131.

and he refuses to disclose it, he may be indicted as "a person unknown." You may add, "but who was personally brought before the jurors by the keeper of the prison."

(ii) The party injured should be described; but only with the like reasonable sufficiency. And, if this be impossible, he too may be described as "a person unknown"; as in the case of the murder of some stranger found dead.

(iii) The acts, circumstances, and state of mind constituting the offence should be set out. Here, again, certainty was formerly required. And in some offences the due degree of legal certainty could only be obtained by employing particular technical expressions; *e.g.* in indictments for any treason by saying "traitorously"; for any felony, "feloniously"; for burglary, "feloniously and burglariously." But now, by the Act of 1915 (Schedule I, rule 9) it will usually "be sufficient to describe any place, time, thing, matter, act, or omission whatsoever (to which it is necessary to refer in any indictment) in ordinary language, in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to." In the Appendix the student will find actual forms of Indictments, which will make these rules clearer to him.

A count must never be "double"; that is to say, must not include two separate offences. (Yet the whole of any *single* transaction, however complex, may be comprised in one count; *e.g.* when *A*, *B*, *C* and *D* have set upon *E* and *F* together, and robbed them¹.) And in early days no indictment could contain more than one count. This simplicity of statement made inevitable a miscarriage of justice, if the facts proved at the trial happened to deviate even slightly from those alleged in the indictment. To avoid this danger, a plurality of counts was soon allowed, describing the same crime in many forms, as if there had been so many distinct

¹ *Reg. v. Giddins*, C. and M. 634. For the alternative possibility, of subdividing a single but complex transaction into separate counts, see *Reg. v. Brettell*, C. and M. 609. *E.g.* nine counts for a wounding of nine cows.

occurrences¹. Later practice came to permit even entirely different crimes to be charged in the same indictment; of course in different counts. But all of them had to be of the same grade, *i.e.* all must be treasons or all be felonies or all be misdemeanors.

But the Act of 1915 (s. 4; Schedule I, rule 3) forbids the joinder of several charges in the same indictment, except when² all the charges either "are founded on the same facts," or else "form, or are a part of, a series³ of offences of the same or a similar character." On the other hand, wherever a joinder does thus become permissible, the old prohibition against joining felonies and misdemeanors together is removed⁴. That prohibition was due to the fact that the procedure at a trial for felony is slightly different from that at trials for misdemeanor. But the Act (s. 4) gets over this difficulty by enacting that "where a felony is tried together with any misdemeanor, the jury shall be sworn, and the person accused shall have the same right of challenging jurors, as if *all* the offences charged in the indictment were felonies." The relaxation, however, does not extend so far as to allow a treason to be joined with a crime of either of the lower grades; the differences in procedure being too great.

As a logical rule, the evidence should of course establish, and the conviction also be for, the actual offence stated in the count which it concerns. But (1) even by common law,

¹ Thus in *Reg. v. Daniel Good* (C. C. C. Sess. Pap. xvi. 233), a case of murder where only the headless trunk of the victim was found, there were thirty-five counts alleging different modes of death.

² Nor even then if embarrassing; *e.g.* adding to *murder* another crime. But when possible it is desirable to multiply counts rather than to multiply indictments, as it saves costs (18 Cr. App. R. 26). Two indictments cannot, even by consent, be tried together (15 Cr. App. R. 23).

³ *E.g.* sixteen separate assaults on sixteen persons (18 Cr. App. R. 42, cf. 59); seventeen makings of the *same* false pretence to seventeen persons, all counts tried at once (C. C. C. February, 1924).

⁴ Thus to a count for a woman's felonious bigamy there may be added one for her misdemeanor in obtaining a separation allowance by the false pretence of being the wife of a soldier (the "second husband").

“averments are divisible”; so that if the words in which a count states an offence involve the statement of some minor offence, the petty jury can reject part of the averment and convict of the minor offence alone, though it was not stated separately. Thus a statement of murder will be a statement of manslaughter if the words “of malice aforethought” be omitted; whilst similarly every statement of aggravated larceny includes one of simple larceny. And the legislature has gone still further, in two ways. For (2) in some cases it has enabled juries to convict of the crime which has in fact been proved, although it is not the crime charged in the indictment¹. Thus on an indictment for any crime the jury may convict of an attempt to commit it²; and on one for robbery, of an assault with intent to rob³; on one for embezzlement, of either stealing as servant or simple stealing; on one for stealing, of embezzlement or⁴ false pretences; on one for murder, of concealment of birth⁵; and on one for rape, or any felony under section 4 of the Criminal Law Amendment Act, 1885⁶ (*e.g.* having carnal knowledge of a girl under thirteen), the jury may instead convict of an indecent assault, or of procuring connexion by threats or by false pretences, or of having carnal knowledge of a girl under sixteen⁷. (3) Again, the legislature has in other cases permitted juries to convict of the crime alleged in an indictment, even though a different (but a graver one) has been proved by the evidence. Thus, on an indictment for misdemeanor, if the facts given in evidence

¹ In one instance, that of Incest, they are allowed to convict of a specified crime even *graver* than that charged; see 8 Edw. VII. c. 45, s. 4 (3).

² 14 and 15 Vict. c. 100, s. 9. Yet the crime may be a felony, whilst the attempt is only a misdemeanor.

³ Larceny Act, 1916, s. 44 (1).

⁴ *Ibid.* s. 44 (2) and (3).

⁵ 24 and 25 Vict. c. 100, s. 60.

⁶ 48 and 49 Vict. c. 69, s. 9.

⁷ *I.e.* where the girl, instead of being under thirteen, is found to be between thirteen and sixteen. By the Children Act, 1908 (8 Edw. VII. c. 67, s. 12 (4)) on an indictment of a person over sixteen for the manslaughter of a person *under sixteen* who was in his charge, the jury may instead convict of any of the numerous offences of cruelty set out in the section. Hence any such indictment will tacitly involve several distinct issues.

prove not only the constituents of the crime alleged, but further elements which constitute some felony in which it has been merged, the prisoner may still be convicted of the misdemeanor¹, notwithstanding its merger; as when a person is indicted for obtaining goods by false pretences, and the false pretence proves to have constituted a felonious forgery. Again, if, on an indictment for obtaining by false pretences, the defendant is proved to have obtained the property by means amounting to stealing, he may be convicted as indicted². A further similar provision is that an accessory before the fact to any felony may be indicted, tried, convicted, and punished as if he were a principal felon³.

Moreover, in all these three groups of substitutions, a prisoner, on being arraigned, may now plead guilty to the substitutable offence, instead of to the one charged in the indictment (4 and 5 Geo. V. c. 58, s. 39 (1)).

At common law any person may prefer a bill of indictment to a grand jury, without even giving notice to the person accused; so that the latter may never know anything of it until the grand jury have actually found an indictment against him, and even then know nothing more of the case he has to meet than the bare outline which the indictment affords him. In practice, indeed, bills are scarcely ever presented to the grand jury until after a preliminary inquiry before a justice⁴. But the common-law liberty of indictment makes it possible for innocent persons to be subjected to great anxiety and expense by groundless prosecutions instituted from spite⁵ or in the hope of extorting money. Yet the only remedy of such a person is the costly and uncertain one of an action for malicious prosecution⁶. Hence the legisla-

¹ 14 and 15 Vict. c. 100, s. 12. Cf. 3 C. and K. 200.

² Larceny Act, 1916, s. 44 (4). ³ 24 and 25 Vict. c. 94, s. 1. *Supra*, p. 90.

⁴ Except for mere quasi-criminal offences as to Highways.

⁵ At Cambridge Assizes in Jan. 1906 a true bill was found against a man whom two benches had refused to commit. He was acquitted.

⁶ Pollock on Torts, ch. viii. iii.

ture has restricted the power of prosecution in the case of some crimes which experience shewed to be peculiarly often made the subject of false accusations. This restriction is imposed by the Vexatious Indictments Act, 1859¹, in cases of (1) perjury and subornation of perjury; (2) conspiracy; (3) obtaining by false pretences; (4) indecent assault; and (5) keeping a gambling house or a disorderly house. And by subsequent statutes, in cases of (6) libel²; (7) misdemeanors under the Debtors' Act, 1869³; or (8) under the Criminal Law Amendment Act, 1885⁴; or (9) under Part II of the Children Act, 1908 (8 Edw. VII. c. 67); or (10) indictable offences under the Merchandise Marks Act, 1887⁵; or (11) offences under the Prevention of Corruption Act, 1906 (6 Edw. VII. c. 34); or (12) the Punishment of Incest Act, 1908 (8 Edw. VII. c. 45). For these no bill is to go to a grand jury unless either

(i) the prosecution has been directed by a judge; or by the Attorney-General or Solicitor-General, or, in the case of perjury, by some other official having power to make such accusation;

or (ii) the accused has been committed for trial, in the ordinary way, by a justice of the peace;

or (iii) the prosecutor has been bound over by a justice of the peace, in recognizances, to prosecute forthwith; and thus get the accusation disposed of promptly. When, on a preliminary examination for any of the offences above specified, the justice refuses to send the case for trial, the prosecutor can demand to be thus bound over to prosecute⁶, and so still take the case to a grand jury. But he does it at the risk of being ordered, in case of acquittal, to pay the costs of the accused and of his witnesses⁷.

¹ 22 and 23 Vict. c. 17. Cf. the *Vexatious Actions Act*, 1896.

² 44 and 45 Vict. c. 60, s. 6. But upon any prosecution of the publisher of a *newspaper* for libel, the check is still closer; for the only way of commencing it is by obtaining the order of a judge (51 and 52 Vict. c. 64, s. 8).

³ 32 and 33 Vict. c. 62, s. 18.

⁴ 48 and 49 Vict. c. 69, s. 17.

⁵ 50 and 51 Vict. c. 28, s. 13.

⁶ 22 and 23 Vict. c. 17, s. 2. It is noteworthy that in several cases at the Central Criminal Court juries ultimately have convicted where a justice had thus refused to commit,

⁷ 8 Edw. VII. c. 15, s. 6 (2).

5. Arraignment.

An *indicted* defendant (contrast p. 438 n. 1) must personally appear¹ at the bar of the court in order to be "arraigned," *i.e.* called to a reckoning (*ad rationem*), by hearing the indictment read; and to plead to it. (The only exception is that, if the trial be in the King's Bench Division and be merely for misdemeanor, the defendant may, by leave of the court, appear by attorney.) If he do not appear, the court will issue a bench-warrant for his arrest and "estreat" (p. 458) his recognizances; and will "enlarge" *sine die* the recognizances of the prosecutor and the witnesses. As a general rule, too, the defendant must remain in court during all the proceedings². But in cases of mere misdemeanors the Court may give him leave of absence so soon as he has pleaded³.

6. Plea and issue.

When the indictment has been read⁴ to him he has several courses open. He may either (1) confess; or (2) stand mute; or (3) take some legal objection to the indictment; or (4) plead to it.

(1) If he confesses, *i.e.* "pleads guilty⁵" he may be at once sentenced. But in serious cases, lest he should be con-

¹ Hence corporations, since they were incapable of appearing in person, were originally outside the criminal law (*supra*, p. 63).

² Cf. 17 Cr. App. R. 193. And he must be capable of understanding the proceedings. Hence the trial of a deaf person or a foreigner may have to be delayed until a competent interpreter is found. For a negro prisoner who spoke Fanti alone, only two competent interpreters could be found in all England (*The Times*, Dec. 9, 1908).

³ Thus the Tichborne claimant was absent on a few of the 188 days of his trial for perjury.

⁴ Under the Indictments Act, 1915, it is the duty of the clerk of the court, "after a true bill has been found on any indictment, to supply to the accused person, on request, a copy of the indictment free of charge." Formerly a felon could not even *buy* one; for fear of his basing on it an action for malicious prosecution.

⁵ Nearly half of the prisoners indicted at Assizes or Quarter Sessions plead guilty. They may plead guilty to some only of the counts; or even to only a part of a count, *e.g.* "I admit the jewels but not the money"; or to a substitutable offence, not mentioned in the indictment (see p. 470, *supra*).

fessing under some misapprehension as to the law or even as to the facts of his case, the court often advises him to withdraw his plea of guilty, and so let the matter be fully investigated¹. As to confessing substitutable offences, see p. 470.

(2) If he "stands mute," *i.e.* says nothing at all, a jury must be impanelled to try whether he is thus mute "of malice," or "by the visitation of God." In the latter case, the question will arise whether or not he can be made to understand by signs. But if he is mute merely from malice, a plea of not guilty will at once be entered². In treason and misdemeanor, standing mute used at common law to amount, on the other hand, to a confession of guilt. But in felony the matter was less simple. It was preferred to try him; yet he could not be tried by jury (instead of by ordeal) without his own consent. To extort that consent he was (until 12 Geo. III. c. 20) subjected to the *peine forte et dure*, by being laid under a heavy mass of iron, and deprived almost entirely of food. Many prisoners deliberately preferred to die under this torture rather than be tried; because, by dying unconvicted, they saved their families from that forfeiture of property which a conviction would have brought about³.

(3) He may shew that the indictment is, on the face of it, open to some legal objection; *e.g.* that a count is too general in its language, or that the court has no jurisdiction to try the offence. Legal objections may be raised by a demurrer⁴; or (which for technical reasons is the far more common course) by a motion to quash the indictment, *e.g.* if the offence alleged is not an indictable one (1 C. and K. 112). Such a motion may be made at any time before the verdict.

¹ In the remarkable case, however, of Constance Kent who, to clear her father's memory, pleaded guilty in 1865 to the Road murder of 1860, Willes, J., at once pronounced sentence of death (*The Times*, July 22, 1865).

² 7 and 8 Geo. IV. c. 28, s. 2. For a modern instance of a verdict of mute of malice, see C. C. C. Sess. Pap. CLVIII. 46; Nov. 1912.

³ The memorable John Gerbage (*supra*, p. 267) thus avoided forfeiture (Y. B. 21 Edw. III. 23). ⁴ The crown may demur to a prisoner's "plea."

(4) He may put in a "plea" to the indictment. The most important pleas are:

i. A plea to the Jurisdiction. This plea is rarely made. For an objection to the jurisdiction of the particular court (as when a man is indicted at the Quarter Sessions for perjury), being a legal objection, may also be raised in the manner just now explained. And if the offence is one over which no English court at all has jurisdiction (*e.g.* an offence committed on board a foreign ship on the high seas), this defence can clearly be raised not only as a legal objection but even under "Not guilty¹."

ii. A plea in Abatement; *i.e.* an objection alleging some fact which shews that there is in the indictment some error of form, as when a peer is arraigned before Assizes or Quarter Sessions². Such pleas, however, have been rendered obsolete by the powers given to amend indictments³.

iii. A general plea in Bar. A plea in bar means a substantial defence. A *general* plea in bar raises the "general issue," and traverses (*i.e.* denies) the whole indictment by alleging that the defendant is "Not guilty."

iv. A special plea in Bar⁴. These are extremely rare, as almost any matter of defence can be raised under "Not Guilty." The only ones which require any notice are:

(α) That of Justification, in cases of libel; where the defendant pleads, under Lord Campbell's Act⁵, that the

¹ *Rex v. Johnson*, 6 East 583. Cf. *Reg. v. Jameson*, L. R. [1896] 2 Q. B. 425.

² In *Rex v. Bray* (Old Bailey Sess. Pap. for 1819, p. 460) a thief had to be acquitted because the indictment styled the prosecutor as Augustus Stanley, whereas his name was Augustine. Cf. p. 538 n. *infra*.

³ 5 and 6 Geo. V. c. 90, s. 5; 14 and 15 Vict. c. 100, s. 24.

⁴ To any special plea the Crown may put in either a "demurrer" on grounds of law, or a "special replication" on grounds of fact. *E.g.* to a plea of "autrefois acquit" the Crown may reply "not acquit of arson but only of murder by arson" (*Reg. v. Serné, supra*, p. 138, *infra*, p. 476).

⁵ 6 and 7 Vict. c. 96; *supra*, p. 315. Such a plea may shew vividly how peculiar to prisoners is the privilege of tendering evidence of good character (*supra*, p. 397). If *A*, being indicted for libellously accusing *B* of theft, should plead the truth of the accusation, *B* (being not a prisoner but a prosecutor)

matter charged as libellous is true, and that it was for the public benefit that it should be published. But on this plea costs may be given against the defendant if he fails to establish it. Along with this defence he may (contrary to the general rule, p. 477) plead at the same time "Not guilty."

(β) A Pardon from the Crown.

(γ) Autrefois acquit; and (δ) Autrefois convict. The general principle of common law is *Nemo debet bis vexari*—a man must not be put twice in peril for the same offence. Hence, if he be indicted again, he can plead as a complete defence his former acquittal or conviction¹. Even though it were in a foreign country that the acquittal or conviction took place, it will none the less constitute a defence in our courts². To determine in any particular case whether such a plea is available, it is necessary to ask: (1) Was the prisoner "in jeopardy" on the first indictment? (2) Was there a final verdict? (3) Was the previous charge substantially the same as the present one?

(1) A prisoner cannot have been in jeopardy if the indictment was legally invalid; for no conviction upon it would have been effectual. If therefore he defeats it by some plea to the jurisdiction (*e.g.* where he has been indicted in the wrong county), or by getting it quashed³, he will still remain liable to be again indicted on the same charge.

(2) It is necessary that a final verdict should actually have been given. If the petit jury were discharged without a verdict (*e.g.* on their being unable to agree), this will no more prevent a second trial than would the fact of a former bill having been ignored by a grand jury.

cannot call evidence of his own good character to disprove its truth; though he could do so, if he were *indicted* for the theft.

¹ And a similar plea is allowed by statute (42 and 43 Vict. c. 49, s. 27) in cases where an indictable offence has been dealt with summarily (the ordinary forms of plea being confined to acquittal or conviction by a jury). As to assaults, see also 24 and 25 Vict. c. 100, s. 44.

² *Rex v. Roche*, 1 Leach 134 (acquittal by Dutch court).

³ But a conviction quashed *on appeal* becomes an acquittal.

(3) To determine whether the two charges are “substantially” identical is often a subtle problem. They are sufficiently nearly identical, if evidence of the facts alleged in the second indictment would legally have been enough to procure some conviction on the first indictment; (whether it were a conviction for the offence actually charged in that first indictment, or even for some other, either of an equal or of a lower degree of heinousness). Hence the two indictments must refer to the same transaction¹. Yet the intent or the circumstances alleged in the one may be more aggravated than those alleged in the other. Thus an acquittal (or similarly a conviction) for a common assault bars a subsequent indictment for an unlawful wounding²; and an acquittal for manslaughter bars a subsequent indictment for murder³, and *vice versa*. But acquittal for wounding with intent to murder does not bar a subsequent indictment for murder⁴; and an acquittal on an indictment for murdering *A* by burning a house in which he was asleep, does not bar a subsequent indictment for the arson of the house⁵. For in each of these

¹ They may do this even though they have stated some of the immaterial circumstances in contradictory ways. Thus if *A* has been indicted for murdering *B* on Monday in one parish, and has been acquitted, he can plead *autrefois acquit* if he be subsequently indicted for murdering him on Tuesday in the adjoining parish, provided he can shew by evidence that, though the averments thus differ, the two charges relate to the same transaction.

² In *Reg. v. Grimwood*, 60 J. P. 809, a man was indicted on four counts; the first three charging the infliction of grievous bodily harm etc., but the fourth merely a common assault. On the first three counts the jury disagreed, but they convicted him of the common assault. He was sent to the Assizes, to be again tried on the first three counts. At the Assizes, however, he pleaded *autrefois convict* (by the verdict as to the common assault); and was accordingly discharged.

³ 2 Hale P. C. 246. Similarly an acquittal for any crime bars a second indictment for an attempt to commit that crime, now that (by 14 and 15 Vict. c. 100, s. 9) a jury, on an indictment for any completed offence, can convict of a mere attempt. And, since by 6 and 7 Geo. V. c. 50, s. 44 (2) a jury may convict of embezzlement upon an indictment for larceny—or *vice versa*—an acquittal for either of these felonies bars a subsequent indictment for the other on the same facts.

⁴ *Reg. v. De Salvi*, C. C. C. Sess. Pap. XLVI. 884. For there may be Murder without either a “wounding” or an “intent to murder.”

⁵ *Reg. v. Serné*, C. C. C. Sess. Pap. OVII. 418.

two pairs of charges, members of the pair are so dissimilar that proof of the allegations made in the second indictment would not necessarily call for some conviction under the first one¹.

In misdemeanors, by a harsh rule, judgment on a plea of *autrefois acquit* or *convict* is final: so that if the accused be defeated on it, he cannot proceed to establish his innocence, but must be sentenced. Yet in felony or treason he is allowed to "plead over," *i.e.* to put in a further plea of Not guilty.

7. Trial and Verdict.

"Justice," says Lord Bacon, "is sweetest when it is freshest." Hence, in grave cases, the Habeas Corpus Act makes definite provision to secure this freshness; by providing that if any man, who has been committed on a charge of either treason or felony, be not indicted at the next Assizes after his commitment, he must be released on bail²; and if at the next subsequent Assizes he be not both indicted and tried, he must be discharged altogether.

When a person indicted pleads *Not guilty* to the accusation he thereby "joins issue³" with the Crown. This issue must be decided by a Trial⁴. If the accused be a peer, and

¹ Similarly an acquittal for burglary with intent to commit larceny will not bar a subsequent indictment for the larceny; though, if the first indictment had charged burglary with an actual larceny, it would be otherwise.

² Unless the witnesses for the Crown cannot appear.

³ The student will be on his guard against the current misuse of this expression, which treats it as meaning to *agree with* a debater's contention—the very opposite of its real meaning.

⁴ Modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him. Hence if any one who was not produced before the committing justice is to be called as a witness, full information should be furnished to the accused, both as to his name and as to the evidence he will give. If this has not been done, his evidence should not be pressed at the trial if the accused objects (per Hawkins, J., in *Reg. v. Harris*, C. C. C. Sess. Pap. xcv. 525). The same principle applies to letters or other documents. Moreover every witness whom it is proposed to call for the Crown must be named on the back of the bill presented to the grand jury that they may, if they like, call him. And every witness so named must be made to attend at the trial, in order that if the Crown do not call him, the prisoner may be able to do so. For the prose-

the accusation be either of treason or of felony, the trial will, as we have seen (*supra*, p. 422), take place before the peers. But in all other cases his indictment will be tried *per patriam*—by a petit jury composed of twelve representatives of his countrymen¹. The history of such trials is noteworthy. Originally, accusations made by the grand jury were tried by ordeal. After the abolition of ordeals in 1215, every accusation had to be referred back to the grand jury, sometimes with the addition of some further colleagues². In the course of a century, it came to be the practice for these new jurors alone to undertake this duty of revision, without the presence of the original accusers; and at last the latter were definitely excluded by a statute of 1352. This produced our present system of two juries. But both juries proceeded upon common repute, or upon their personal knowledge; men who knew the circumstances of the crime being often put on as additional or “afforcing” jurors. About 1500, however, such

cuting counsel is not bound to call all his witnesses (2 C. and K. 520; C. C. C. Sess. Pap. xci. 83, 136; cii. 317), since the evidence of some of them may seem to him to be irrelevant or even untrustworthy. But should the prisoner elect to call a Crown witness who has been thus passed over, he thereby makes him his own witness; and the Crown can accordingly cross-examine the witness, and can reply on his evidence (*Reg. v. Cassidy*, 1 F. and F. 79).

¹ See Pollock and Maitland, i. 138, ii 617; Stubbs' *Const. Hist.* i. s. 164; Stephen's *Hist. Cr. Law*, i. 254. “The most transcendent privilege which any subject can wish for is, that he cannot be affected in his property or liberty or person but by the unanimous consent of twelve of his neighbours and his equals. This, for a long succession of ages, has secured the just liberties of this nation” (3 Bl. Comm. 379). It is true that, as an instrument of accurate inquiry, the value of the jury may sometimes be small. In matters of complicated mercantile accounts, or in scientific disputes about a prisoner's insanity or the results of a poison, or in any very protracted investigation, trial by a common jury—“that bizarre creation” as Garofalo calls it—would have little superiority over trial by Ordeal or by Compurgation, were it not for the guidance afforded in the judge's summing up. Hence, ever since the Rules of 1883 (Order xxxvi. rule 7), trial by a judge, with no jury, has been recognised as the normal *civil* method. But in criminal cases it is not so important that the verdict should be accurate as that it should be humane, and moreover be supported by public sentiment; to let some guilty men escape is a less evil than to punish any innocent man. Consequently, in all criminal accusations that are of any gravity, the protection afforded by trial by jury is a privilege worthy of the eulogium pronounced on it by Blackstone.

² Pollock and Maitland, ii. 628, 647; Holdsworth, i. 323, 334.

persons ceased to be added to the jury itself, and instead were sent to give evidence before it. This differentiation of the functions of the witness from those of the juror was intensified, two centuries later, by allowing witnesses to be called expressly on behalf of the prisoner. Documentary evidence became common before that of witnesses; and it seems probable that even the evidence of witnesses was at first usually received in a written form. At any rate the practice of producing the witnesses themselves at the trial, to give their evidence orally in open court—though well-established in non-political cases at least as early as Elizabeth's reign¹—did not become usual in trials for treason until the Commonwealth². Under James I. and Charles I. the evidence produced to the jury in political trials usually consisted only of "examinations," *i.e.* reports of what had been said by witnesses when interrogated by royal commissioners, in the absence of the prisoner and in private—perhaps in prison or even on the rack. Often the accused himself was thus interrogated; as when Peacham, in 1615, was examined "before torture, in torture, between torture, and after torture³." But from the time of the Commonwealth onwards the modern course of trial has prevailed, in political as well as in non-political cases⁴.

To serve as a petty juror in criminal cases (or as a common juror in civil ones) a person⁵ must (1) be over twenty-one

¹ Sir T. Smith's *Commonwealth of England*.

² The provision made (*supra*, p. 277) by 1 Edw. VI. c. 12 to secure the production of at least two witnesses in open court in all cases of treason was regarded as having been impliedly repealed by 1 and 2 P. and M. c. 12.

³ *Supra*, p. 269; 2 St. Tr., at p. 871. On the trial of Lord Essex in 1600 (1 St. Tr. 1333), in which many of these "examinations" were used, Coke, then Attorney-General, blamed the "overmuch clemency" of Elizabeth in having had no witness racked or tortured whilst being examined.

⁴ A recent inroad upon the dignity of trials is checked by the Criminal Justice Act, 1925, which makes it an offence, punishable by a fine of £50, to sketch for publication, or to photograph, in any court whether criminal or civil, any of the persons concerned in a judicial proceeding: (s. 41).

⁵ Of either sex. For the Sex Disqualification (Removal) Act, 1919, 9 and 10 Geo. V. c. 71, provides that "A person shall not be disqualified by sex or marriage from the exercise of any public function, or from...holding any

years of age¹; and (2) be the owner, in fee or for life, of lands or tenements worth £10 a year or of long leaseholds worth £20 a year, or else be the occupier of a house rated at £20 a year, or if in Middlesex at £30². In each county the sheriff returns a "panel³," or list, at every assize, of persons thus qualified whom he has summoned. There is no fixed number; but forty-eight is a frequent number at Assizes, and thirty-six at Sessions. From this panel⁴ the clerk calls twelve names, and the prisoner then has the opportunity of challenging any of these jurors.

Challenges are now almost unknown in England⁵, though less rare in Ireland⁶. They may be either to the "array" (*i.e.*,

civil or judicial office;...and a person shall not be exempted by sex or marriage from the liability to serve as a juror." But the judge who tries a case, criminal or civil, may—on application of either side or at his own instance—make an order "that the jury shall be composed of men only, or of women only." It has since been provided, by Rules, that every jury panel shall include women in the same proportion as they hold in the local list of persons qualified to be jurors; and, if possible, not fewer than fourteen women. But husband and wife are not to be on the same panel.

¹ If over sixty he may claim exemption.

² In boroughs that have a court of Quarter Sessions (*e.g.* Cambridge) the qualification for its jury is that prescribed for Local Government elections. Consequently *there* every woman is qualified as a juror for Sessions (though not for Assizes) if she have reached the age of thirty and be the wife of (and reside with) a local-government elector.

³ *I.e.* a strip (Latin, *pannus*); hence names written on a strip of parchment. In Scottish law, however, the person or persons accused is, or collectively are, called "the panel," *i.e.*—the *list* named in the indictment.

⁴ At the Assizes there is also a further panel of "special" jurors, of greater wealth, *i.e.* householders rated at not less than £100 a year (33 and 34 Vict. c. 77); but for criminal cases a jury is never taken from this list, except in the rare cases where the indictment has been found in, or removed into, the King's Bench Division; see p. 427 *supra*.

⁵ This rarity makes it easy to arraign together before one jury prisoners concerned in different indictments; thus saving time.

⁶ In the United States, from the diversities of race and language, they are employed freely, sometimes occupying two or more days of a trial. Hence, "experience in the selection of a jury is one of the 'fine arts' of an [American] advocate." A like cause may lead to a like result in East London. In one case, there, eight of the twelve jurors were Polish Jews who could not write. Maître Lachaud, that most successful defender of prisoners in France, made it his rule, "I challenge every man who looks intelligent." In Ireland a kindred rule was at one time current; "Challenge every juror who wears a neck-tie."

the whole panel), where the sheriff has composed it in an unfair manner, *e.g.* by choosing men on the ground of their religion; or to the polls (*i.e.* to individual jurors). Felons jointly indicted sometimes challenge *different* groups of jurors, so as to secure being tried separately; *e.g.* when one prisoner has made admissions, or been found in possession of papers, that would not be legal evidence against the other man. An individual may be thus challenged either for cause shewn, or even "peremptorily" (*i.e.* without shewing cause). A challenge for cause may be made *propter respectum*, *e.g.* to a peer; *propter affectum*, *e.g.* for being near of kin to the defendant; *propter defectum*, *e.g.* for infancy or alienage; *propter delictum*, *i.e.* on the ground of the juror's having been convicted of some infamous offence, *e.g.* perjury. These objections may be raised either by the Crown or by the accused. But a "peremptory" challenge can be made only by the accused; and by him only in cases of treason or felony¹. Thus a misdemeanant cannot exclude his bitterest enemy without legal proof of the hostility². In treason the prisoner has thirty-five peremptory challenges, and in treason-felony and felony twenty.

The jury are then sworn³. If the case be one of felony or treason, the indictment is read over to the jury; which is called "charging⁴" them with the inquiry concerning the

¹ Hence in treason and felony the jurors have always been sworn separately—to give the prisoner a full opportunity of challenging each—while in misdemeanor they were, till the Oaths Act of 1909, sworn in groups of four.

² But in misdemeanors the defendant is generally allowed to exercise the privilege (which the Crown possesses in all criminal trials) of requiring any jurors to "stand by," *i.e.* not to serve unless a full jury cannot be made up without them (*Reg. v. Blakeman*, 3 C. and K. 97).

³ The Criminal Justice Act, 1925, s. 15, provides against death or illness of a juror, or of *two*, during a trial; allowing the remainder to act, if prosecutor and accused consent in writing.

⁴ Until they had performed this charge, by completing the inquiry, the common law did not permit them, in cases of treason or felony, to depart from the custody of the court, however protracted the trial might be. In 1873, in *Reg. v. Moore*, an Irish trial for murder (114 witnesses), the jury were thus secluded for more than six weeks (*The Times*, Sept. 11, 1873, p. 4).

In misdemeanors, however, the common law did not impose any such

prisoner. It is not so read in cases of misdemeanor, because there the defendant was always entitled to a copy. The indictment is then "opened"; that is to say, the counsel for the prosecution¹ addresses the jury; in order to direct their minds to the main questions in dispute, to tell them what evidence he proposes to adduce, and to explain its bearings upon the case². If the prisoner is not defended by counsel³, and the case is simple, this speech is often waived. Such a waiver affords a good illustration of the important principle that a prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty—that of doing everything that he honourably can to protect the interests of his client. He is entitled to "fight for a verdict." But the crown counsel is a representative of the State, "a minister of justice⁴"; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused⁵. "It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly necessary. And now by the Juries Detention Act, 1897 (60 and 61 Vict. c. 18), upon the trial of any person for a felony (other than treason or murder or treason-felony) the court may, if it see fit, permit the jury to separate, at any time before they consider their verdict, in the same way as if the trial were for a misdemeanor.

¹ A prosecutor who employs no counsel is not allowed (as he is in summary proceedings) to make any such opening speech or to examine the witnesses.

² In Scotland there is no such speech; its absence makes the work of the jury harder.

³ Probably about two-fifths are not. In their case "it is the duty of the judge to watch their interests; though he is not there to be the counsel of either side, but to do justice"; Lord Reading, L.C.J., at C. C. A., Aug. 28, 1919.

⁴ 4 F. and F. 499. Cf. L. R. [1916] 2 K. B. at p. 623.

⁵ *E.g.* if the prisoner has written one letter confessing the crime, and another retracting this confession, the Crown must not put the former in evidence without producing the latter also. Similarly, if the victim of an alleged assault has been examined by the police-surgeon, this surgeon should be called by the Crown, even if he negative the assault. Cf. p. 546, *infra*.

intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts¹."

On concluding his address, the prosecuting counsel calls his witnesses, one after another; and each is examined in chief, cross-examined, and re-examined, successively². Then, the Crown evidence being thus completed, the prisoner's counsel sometimes submits that it is not such as could reasonably satisfy any jury that the accusation is established; and he therefore asks the judge to withdraw the case from the jury. If the request be refused or not made, then comes the defence of the person accused³.

(1) If the accused has no witnesses to call (except witnesses merely to character), he may nevertheless himself give evidence on oath (should he desire to do so) and be cross-examined upon it⁴. After doing this (or declining to do it), and calling any witnesses to *Character*; then

(a) if he have no counsel, he may address the jury in his own defence;

(b) if he have counsel, the-prosecuting counsel may, should there actually be adequate cause⁵, make a second speech, summing up the Crown evidence and commenting on the prisoner's own evidence⁶ (if any). Then the counsel for the accused addresses the jury⁷.

¹ Sir J. Holker, Att.-Gen. (*The Times*, Feb. 25, 1880).

² *Supra*, p. 353. And the prisoner's statement to the committing justice is usually read now; cf. p. 454.

³ The old "inquisitorial" character of our criminal trials survives in the rule that in criminal trials a judge can call a witness (62 J. P. 232, 149 C. C. C. Sess. Pap. CLXVII, 175); but in civil trials he cannot do so except by consent of the litigants (L. R. [1910] 1 K. B. 337). See also 20 Cr. App. R. 86.

⁴ See p. 407 n. 4, *supra*.

⁵ *E.g.* if the evidence has proved to be other than was indicated in his opening speech; *Reg. v. Holchester*, 10 Cox 226.

⁶ *Reg. v. Gardner*, L. R. [1899] 1 Q. B. 150.

⁷ By a somewhat harsh privilege, the Attorney-General or Solicitor-General, if present in person, may—in both (a) and (b)—make a final speech in reply. Otherwise a prisoner, by calling no witnesses, secures the right to the last word. In Ireland he never has that right, even though he call no witnesses. In most of the United States he never has it. In France always.

(2) But if the accused has witnesses to Facts then, so soon as the Crown witnesses have finished, his counsel¹ (or he²) "opens" his case. Then his witnesses (including himself, if he desire to give evidence on oath) are examined, cross-examined, and re-examined³. His counsel (or he) makes a second speech, summing up the defence. Finally the prosecuting counsel makes a speech in reply.

When both cases have thus been fully stated it becomes the duty of the judge to sum up the case to the jury; a security for justice unknown to the tribunals of classical antiquity⁴. He not only directs them as to any points of law that are involved in the case, but also advises⁵ them, though not imperatively, as to the bearing and value of the evidence. There was no enforceable standard for summings up until the creation of the Court of Criminal Appeal. But now it requires every summing up to be not only accurate but also adequate.

¹ Where several prisoners, who are being tried together, take the same course as to calling (or not calling) witnesses, their respective counsel usually make their speeches (not in order of professional seniority but) in the order in which their several clients' names occur in the indictment (*Reg. v. Barber*, 1 C. and K. 439). Where, again, some prisoners call witnesses but others do not, the counsel for the latter will have the right to the last word; and so will not speak until after the Crown counsel has replied upon the evidence tendered by the other prisoners (*Reg. v. Burns*, 16 Cox 195; cf. C. C. C. Sess. Pap. xcvi. 363, cvii. 147, cxl. 602, cxix. 22).

² See p. 409 *supra*. To statements of Fact in his address "the jury may, as regards himself, pay any degree of credence that they may think fit" though they are not uttered upon oath (Channell, J.).

³ In the rare cases where the witnesses for the defence introduce new matter of importance which the prosecution could not have foreseen (*e.g.* an alibi, or insanity), rebutting evidence, to contradict them, may be called even at this late stage. *Reg. v. Frost*, 4 St. Tr. (N. S.) 384; *Rex v. Stimpson*, 2 C. and P. 415.

⁴ Yet in England it is found as early as 1348; Holdsworth, III. 614. But in France the judges were deprived in 1881 of the power of summing up, as they were thought to exercise it too exclusively in the interests of the prosecution. American lawyers complain of the restrictions whereby some of their States limit or abolish the judges' power to express an opinion on questions of fact, and to control trials "and hold the jury to its province" (see Prof. Roscoe Pound's *Spirit of the Common Law*, p. 123). They attribute to this lack of guidance many undeserved acquittals.

⁵ *Supra*, p. 478 n. Cf. 18 Cr. App. Rep. 132; and L. R. [1906] A. C. 130.

The judge may ask the jury to answer definite questions of fact; but they are entitled to refuse to do so, if they prefer to give a general verdict.

The jury then have to consider their verdict¹, and may, if necessary, retire for this purpose². The jury may, at their discretion, return either a "special" verdict, *i.e.* one on the facts alone³, or a "general" verdict, pronouncing on both the facts and the law⁴; *i.e.* "Guilty," or "Not⁵ guilty." The verdict may dispose of the whole indictment in the same way, or may pronounce the prisoner guilty on some counts but not on others, or even on one part of a divisible count but not on the residue. We have already seen (p. 469) that, in a few exceptional cases, juries are empowered by modern statutes to convict of an offence other than that which the evidence has established. The first delivery of the verdict is not final; for the court may direct the jury to reconsider it. If they

¹ A verdict must be the utterance of twelve jurors; so that in the petty jury, as there are but twelve, unanimity is essential. But in any larger jury, such as a grand jury or (Lunacy Act, 1920) a jury on an inquisition of lunacy—and similarly with the Peers (*supra*, p. 422)—a mere majority suffices, if it consist of twelve. In Scotland (the jury there consisting of as many as fifteen) the verdict of a majority suffices. In India, a High Court jury is of nine, and the verdict of six suffices if approved by the judge, whilst in the Sessions courts the verdict of a simple majority suffices if approved by the judge. In France, a simple majority suffices. As to illness, see p. 481 n³.

² They are no longer debarred from "food, drink, and fire" after retiring; the Juries Act, 1870, permits them to have, at their own expense, "reasonable refreshment."

³ These are rare; but a modern instance occurs in *Reg. v. Dudley*, L. R. 14 Q. B. D. 273 (K. S. C. 61); *supra*, p. 76.

⁴ It has sometimes been suggested that the jury are thus "made judges of the law as well as of the facts." But this is not so; for it is their duty to adopt the law as laid down to them by the judge. (See 21 St. Tr. 1039; and, in U. S. A., 2 Sumner 243, 15 Sup. Ct. 273.) True there is *now* (contrast Noy 48, Yelv. 24, 6 St. Tr. 967) no legal redress if they violate this duty; *e.g.* if they declare a homicide to have been a murder although by law it was justifiable. But this legal impunity only shews that their duty of making their verdict accord with the law, is—like their duty of making it accord with the evidence—not a jural but an ethical obligation.

⁵ Meaning that there is not full legal proof of guilt; but not necessarily that they think him *innocent*. See pp. 390–1. Scotland, by a third alternative verdict ("Not proven," like Rome's "Non liquet"), avoids this ambiguity; and so renders "Not guilty" a clearly definite exculpation.

find it hopeless to agree, the judge may discharge them. Cases have been tried even four times, owing to successive disagreements; *e.g.* Tease, at Belfast, in 1909.

We have said that of all the persons who are indicted nearly three-sixths plead guilty. We may add that about two-sixths are tried and found guilty, and rather more than a sixth are tried and acquitted.

On being convicted of felony or treason, the prisoner is asked if he has anything to say why the court should not give judgment against him. The inquiry contemplates only objections *of law*; *i.e.* grounds for a motion in arrest of judgment (now practically unknown). The question might well be abandoned, as not only useless but also apt to elicit irrelevant and mendacious protestations of innocence¹. Cf. Lewis' *Criminal Code*, p. 193.

After conviction, but before judgment, was the usual time to pray Benefit of Clergy². This privilege was so remarkable that it deserves the student's attention. After William the Conqueror separated the ecclesiastical from the secular courts, the clergy began to put forward a claim that all persons in holy orders should be exempt from secular jurisdiction in all litigation, civil and criminal. Any clerk accused of crime was accordingly sent to the bishop's court. He was tried there before a jury of clerks, by the oaths of twelve compurgators; a mode of trial which usually insured him an acquittal. But even if he were convicted, the court could not inflict death, but could only degrade him and imprison him. About 1300, however, a change was made, by surrendering no accused clerks to the bishop until after they had undergone

¹ A salient instance of the untrustworthiness of such protestations is that of Alvin, sentenced to death at York for murder in 1712. During the "condemned sermon" he made a loud protest of his innocence; which so startled the preacher, the Rev. Mr Mace, that he fell dead in the pulpit. Alvin claimed this as a Divine vindication of himself. Yet, at his execution, he confessed his guilt. (Poulson's *History of Holderness*, II, 407.)

² See Pollock and Maitland, I. 441; Holdsworth, III. 293.

conviction in the secular court, and had thereby forfeited their chattels. And it was also settled that the clergy had no such "benefit" in civil cases, or in misdemeanors, or (soon afterwards) in treason. But, on the other hand, the benefit was extended to all persons eligible for ordination, although not actually ordained; *i.e.* to all males who could read; which soon came to mean, who could learn a few words by heart. But in 1487 it was enacted that these mere laymen should have the benefit only once, and should be branded on the thumb to shew that they had had it¹. Under Henry VIII. benefit of clergy was removed from "wilful murder of malice aforethought" (*supra*, p. 126). Under Elizabeth all surrenders to the bishop, and all distinctions between ordained clerks and laymen, were abolished; and henceforth every person who obtained the benefit became liable to be kept in gaol for a year. Under William III. the benefit was extended to women, and independently of their being able to read; and under Anne reading was made unnecessary for men also. On the other hand, successive statutes took away the benefit from the more heinous crimes; until in Blackstone's time there were one hundred and sixty felonies in which it could not be claimed, *i.e.* which were really capital. Finally, in 1827, benefit of clergy was abolished by 7 and 8 Geo. IV. c. 28. It survived longer in parts of the United States; and was successfully claimed in South Carolina at least so recently as 1855 (*State v. Bosse*, 42 S. C. 276; cf. 35, 372).

8. Judgment.

Sentence is sometimes postponed, in order to give the prisoner an opportunity of mitigating it by making restitution or giving information; or in order to inflict on him *some* punishment without any obvious disgrace, when it is intended merely to discharge him on recognisances.

¹ A book of 1633 (*Whimsies*, p. 69) says, "If a prisoner, by help of a compassionate prompter, hack out his Neck-verse (Psalm li. 1) and be admitted to his clergy, the jailors have a cold iron in store if his purse be hot; but, if not, a hot iron, that his fist may cry *Fiz*."

A criminal decision, whether of conviction or of acquittal, constitutes a conclusive estoppel as between the crown and the prisoner. But in any subsequent civil proceeding between either of them and a third party, that decision is no estoppel. Some authorities doubted its being even admissible as mere *prima facie* evidence. But it was decided to be so in *Re Crippen*, L. R. [1911] P. 118.

Already, in our successive accounts of the various kinds of criminal offences, we have mentioned, in connection with each one, the character of the punishments which the law prescribes for it. All that now remains, therefore, is to state some provisions which affect punishment in general. Thus the Bill of Rights provides that "excessive fines ought not to be imposed, or cruel and unusual punishments inflicted." Hence judges cannot create new punishments¹.

The forms of punishment now permitted by law are death, penal servitude, imprisonment (with or without hard labour), whipping, fine; and, chiefly in the case of juvenile offenders, detention (in reformatories, etc.).

The penalty of Death² is now practically restricted to cases

¹ Thus where a defendant was sentenced to be imprisoned, and also to ask the prosecutor's pardon and advertise the fact in certain newspapers, this was held bad, except as to the imprisonment (1 Wilson 332).

² The hanging does not operate now through suffocation, but—by a "long drop" invented by Professor Haughton of Dublin—dislocates the vertebræ and so produces an instantaneous and painless death. Persons under sixteen cannot now be sentenced to death, but are "detained" during the King's pleasure; 8 Edw. VII. c. 67, s. 102. No one under *eighteen* is in practice ever executed. Bishop, aged eighteen, was executed in 1925. Women are rarely executed; but in 1923 one was, and another in 1926.

Sir Harry Poland says (*Seventy-two years at the Bar*, p. 321) "I have found that the fear of penal servitude is nothing like such a deterrent as the fear of being hanged." Mr Justice McCardie pronounces the latter fear "the most powerful deterrent that has been, or can be, known." But for the penalty of Death the burglar would find it worth while to kill his victim to prevent his appearance as a witness; and a prisoner already in penal servitude for life would have nothing to fear if he killed his warder. On Dec. 1, 1925, under a like immunity, a prisoner awaiting execution in a Burmese gaol, raised a mutiny in which seven were killed. "That bit of rope," said a convict once, in England, "is a great check on a man's temper."

of murder¹. The average annual number of capital sentences is about thirty, and only about half of these are actually carried out².

Penal servitude was established in 1853³ to take the place of transportation⁴. It is never imposed for less than three years⁵; whilst, on the other hand, the usual maximum for which a person can be sentenced to imprisonment with hard labour—or to any form of imprisonment for a statutory⁶ offence—is only two years⁷. The number of sentences of penal servitude passed in 1923 was 474; or about one in every fourteen convictions upon indictment. An offender who, after having once been convicted of any felony, is again convicted of some felony, may, as a rule, be sentenced to penal servitude for life⁸. But a misdemeanant's legal maximum of punishment is not thus affected (except under special statutes) by his former offence.

¹ There are, however, three other capital offences: viz. treason and certain forms of piracy and arson (*supra*, pp. 163, 277, 320). But although since 1820 nineteen persons had been convicted of treason, the death sentence was commuted in each case until Casement's in 1916.

² Executions are usually deferred until after the third Sunday after the passing of the sentence; and take place at eight in the morning, and not on a Sunday or a Monday.

³ No one under sixteen can be sentenced to it.

⁴ Transportation had been originally established by the device, which in 1665 Kelyng (fo. 45) treats as still novel, of giving pardons conditional on the convict's remaining in a colony for seven years, and passing five of them in service. At the end of that service he received a grant of land.

⁵ 54 and 55 Vict. c. 69. Until this statute the minimum was five years.

⁶ Where it is by the common law that a punishment is prescribed, there is no maximum limit to imprisonment. Hard labour—now always permissible, but nominal (see p. 318 and p. 490 n. 1)—is the creation of statute-law.

⁷ Practically speaking, a sentence of two years' imprisonment with hard labour is more severe than one of three years' penal servitude. For a convict in penal servitude is no longer kept in separate confinement at all; but from the first is employed only in associated labour. Moreover his dietary is more liberal than in most of the time of an imprisonment, and his labour less continuously severe, and more often in the open air. But his privilege of earning by good conduct (as fourteen convicts in fifteen do) a ticket of leave, releasing him after serving about three-fourths of his term, has now been extended to persons under imprisonment for over a month, after serving five-sixths of it.

⁸ But if this second felony be simple larceny, only to ten years' penal servitude. All "life" sentences are reconsidered after twenty years. As to "Preventive Detention" after penal servitude, see p. 508 *infra*. Cf. p. 546 *infra*.

Imprisonment involved, at common law, simply the deprivation of liberty; but now it may take several forms. (α) A nominal¹ obligation to perform (not only work but) hard labour may be added to it. Such imprisonment was first authorised in 1776. (β) Ordinary punishment, without this hard labour, is now known technically as that imposed upon "offenders of the Third Division." (γ) Below this² is that of "offenders of the Second Division"—who enjoy easier discipline, *e.g.* as to prison-dress and letters and visits (though not as to food or labour), and are kept apart from the Third Division. Persons imprisoned in default of finding sureties must be placed in this class. (δ) A still lighter form of imprisonment is that of the "offenders of the First Division." These do not wear prison dress, and in fact incur little inconvenience beyond the mere detention. All persons imprisoned for sedition³, for criminal contempt of court⁴, or for offences against⁵ the Vaccination Acts, must be placed in this division. These are the only forms of criminal imprisonment⁶. If no division is specified by the judge, a prisoner is put into the

¹ For the labour is not really "hard," now. (But the sentence involves the prisoner (if a male) in having to spend some of the first weeks in solitary confinement.) So the C. J. A. Act, 1914, s. 16 (1), now allows it for all offences, even common-law ones; though forbidding it for mere non-payment of fines. Crank and treadmill are gone. Cf. p. 318 *supra*.

² In order to keep those prisoners that are not of criminal habits out of all contact with the hardened offenders. It is useful in cases like default of fine, or drunkenness, or petty assaults.

³ 40 and 41 Vict. c. 21, s. 40.

⁴ 61 and 62 Vict. c. 49, s. 5.

⁵ *Ibid.* s. 41.

⁶ In 1923, the number of criminal sentences of imprisonment *without* option of fine was 31,072; only about one-seventh being after trial on indictment. The prisoners received were classified thus: (a) with hard labour, 25,594; (b) in the third division, 18,234; (c) in the second division, 1719; (d) in the first division, 9. And 629 juvenile offenders were sent to reformatories, and 463 to industrial schools. Civil-debt prisoners are about 11,000 yearly. At Assizes, great care is taken to send to the second division such offenders as had never fallen into crime before. But justices of the peace avail themselves far too little of this classification.

Sentences at Quarter Sessions *now* date from pronouncement. But those at an Assize date from, and include, its Commission Day. Hence an Assize sentence of "three days' imprisonment" *may* only mean instant discharge.

third. There exists also an even more lenient form of incarceration which is used in cases of *civil* debt.

By the Children Act, 1908 (8 Edw. VII. c. 67, s. 102) a person under fourteen cannot be sentenced to imprisonment; nor even one under sixteen, unless he be too unruly or too depraved for confinement in a mere Place of Detention. It must be remembered (see p. 97 n. *supra*) that a sentence for *felony* involves forfeiture of any pension unless the sentence be only one of imprisonment for not more than twelve months and without hard labour. And an Old Age pension is forfeited by a sentence of imprisonment (for *any* offence) during two years after release if the imprisonment do not exceed six weeks, or during ten years if it do.

Lighter than imprisonment is "Detention under penal discipline" as "inmate" (not "prisoner") of a Borstal Institution. See p. 509 *infra*.

Offenders under sixteen may be sent to "Custody in a Place¹ of Detention" for a month or less; or (a) if between twelve and sixteen years of age, to a Reformatory School for not less than three, and not more than five years; and (b) if under twelve (or under fourteen but of good character), to an Industrial School².

Whipping (now possible only under statutes) is authorised³ for male offenders, even adults, in a very few gross cases, such as robberies with violence, and also in the case of "incorrigible rogues⁴." Boys who are under the age of sixteen may be sentenced to a whipping in a very much wider range of cases,

¹ In 1921, 36 were so sent. As to "Detention in *Police Custody*" for four days or less, even of adults, by a sentence at petty sessions, see p. 441.

² 8 Edw. VII. c. 67, ss. 57-106. An Industrial School retains no one after sixteen; a Reformatory School, no one after nineteen. For an offender's maintenance in either, his parent may be ordered to pay. And by s. 99 a fine or damages or costs incurred by an offender under sixteen may be exacted, instead, from the parent or guardian if his neglect conduced to the offence. Probation has largely suppressed Reformatory Schools; practically halving the number sent.

³ The character of the whipping is regulated by 26 and 27 Vict. c. 44, s. 1. The whole of it must be inflicted at one time.

⁴ *Supra*, p. 327. And of Procurers; 2 and 3 Geo. V. c. 20, ss. 3, 7 (5).

including various offences against the Larceny Act, 1916, the Offences against the Person Act, 1861, the Malicious Damage Act, 1861; and boys under fourteen¹, when convicted summarily of *any* indictable offence may be ordered to be whipped, with or without other punishment. Boys of fifteen or less are sometimes released on their fathers promising to chastise them.

Fining² is a punishment rarely resorted to in the higher criminal courts. It is employed in less than one per cent. of the convictions upon indictment, and this only in cases where the offence involves little or no moral guilt. But it is inflicted by courts of summary jurisdiction in about ninety per cent. of their convictions for petty offences.

By the modern repeal of all the statutes which for certain offences prescribed minimum punishments, English criminal courts have obtained, at the present day, a complete power of remitting punishment—a discretion very rarely intrusted to judges under the continental codes³.

It has become common (see Cr. App. R. 5. 172, 2. 159) for judges, when determining the sentence on a prisoner, to be asked to “take into account” other charges of the same *kind* of offence, on which warrants have been issued against

¹ 42 and 43 Vict. c. 49, s. 10 (1); 8 Edw. VII. c. 67, s. 128 (1). In 1923, 530 persons were whipped; only 16 of them after an indictment.

² A fine must be distinguished from the (now vanished) amercement. An amercement was a pecuniary penalty fixed by the jurors; but a fine is fixed by the court. The earliest fines were compositions agreed upon between the judge and the prisoner, to avoid imprisonment, at a time when the King's judges had no power to impose pecuniary punishments (Pollock and Maitland, II. 515).

Care should be taken, when inflicting a fine, to ascertain the resources of the person fined, and to proportion it to them. The Portuguese Code consequently measures every fine by multiples of the offender's actual daily income. Yet even this does not meet the fact that the loss of a day's small earnings is felt more keenly than the loss of a day's large earnings.

³ The evil effect of minimum punishments in creating in the minds of juries an exaggerated reluctance to convict is vividly illustrated by the fact that on the final abolition of the minimum limit of punishment (ten years' penal servitude) for unnatural offences, the percentage of trials for such crimes which ended in convictions rose at once from the remarkably low rate of 35 to 47. *Criminal Judicial Statistics*, issue of 1896, p. 26.

him, and which he now (1) admits to be true, and (2) desires to be now dealt with. Cases so dealt with should then be endorsed on the indictment. The total punishment does not usually exceed what would be the maximum for *one* offence of that class. In one case in 1925, fifty-two such other charges were thus taken into account. It is a wise practice; for the offender thus secures a free start on coming out of prison, instead of being rearrested. But charges of offences of a different kind (*e.g.* false pretences as against burglary) are less readily taken into account.

Besides these punitive measures, a court may also make orders whose effect is of a purely preventive character. Thus, with the object of removing the young from criminal surroundings, a Court of Petty Sessions may order children frequenting the company of thieves or found begging, and destitute children who are orphans or whose parents are undergoing penal servitude or imprisonment, to be sent to a certified industrial school till they reach the age of sixteen¹. Another preventive measure is that of Supervision of an adult by the police for a fixed period after his punishment; for whenever a prisoner is convicted of felony, or of one of certain grave misdemeanors, after having been previously convicted of a crime of equal degree², the judge may direct that, after completing his sentence, he shall be subject to supervision for a specified period; perhaps three years. (As to the Preventive Detention of habitual criminals, see p. 508 *infra*.) At the other extreme, even a person who has not committed actually any offence at all may be required to find sureties³ for good behaviour or to keep the peace, if there be reasonable grounds to fear that he may commit some offence, or may

¹ The Industrial Schools Act (29 and 30 Vict. c. 118), s. 14.

² Prevention of Crimes Act, 1879 (42 and 43 Vict. c. 55), s. 8. And at the opposite extreme, an offender who deserves *no* actual punishment may be supervised; but by a "Probation Officer": see *infra*, p. 510.

³ "This power of binding over is the most useful power that a justice possesses. And it is the only one which he derives from his commission and not from any Statute" (Sir Chartres Biron).

incite others to do so, or may act in some manner which would naturally tend to induce other people (even against his desire) to commit one¹.

After the judgment itself has been given there are further Orders which the judge may have cause to make.

(a) Of one such we have already spoken²—the order which, after any trial for theft, the court may make for Restitution, to the true owner, of stolen property which has been identified at the trial.

(b) Another, of much more frequent application, may be made in respect of Costs. In criminal law costs do not “follow the event.” The common law knew nothing of costs. And the statutes which introduced them did not mention the Crown—an omission which Blackstone elevates into rules that it is the prerogative of the Crown not to pay costs, and that it would be beneath its dignity to receive them³. Hence, as criminal proceedings are technically at the suit of the Crown, no judgment for costs could be given in them. Even if the prosecution were in fact brought by a private individual, the law in no way reimbursed him for the outlay he had incurred in discharging this public duty. But criminal courts are now empowered—the latest and most comprehensive statute being the Costs in Criminal Cases Act, 1908⁴—to order the reasonable costs of the prosecution and of the witnesses for the defence, or of either of them, to be repaid out of public funds, in the case of any *indictable* offence. (The merely quasi-criminal offence of obstructing a road or river is excepted.) The power is given, not only to Assizes and Quarter Sessions,

¹ *E.g.* a controversial lecturer, whose open-air addresses are such that a breach of the peace will naturally result, may be required to find sureties; *Wise v. Dunning*, L. R. [1902] 1 K. B. 167. See p. 284, *supra*.

² *Supra*, p. 224.

³ III. 400; cf. *Rex v. Abp of Canterbury*, L. R. [1902] 2 K. B. 503.

⁴ 8 Edw. VII. c. 15, s. 1. The scale of costs allowed to witnesses is fixed by the Home Secretary. See Statutory Rules and Orders of 1920, no. 354. The money is paid *locally*, out of the rates of the county or county-borough where the offence was committed.

but also to justices of the peace when dealing summarily (*supra*, p. 439) with an indictable offence, or when holding (*supra*, p. 452) a preliminary examination about one. Neither side, usually, will receive an allowance for witnesses who speak only to character. The costs allowed to a prosecutor are said to have averaged about £10; but see p. 95 n. 1.

Besides these orders upon public funds, orders for costs may now also be made upon individuals concerned in the criminal proceedings. For (s. 6) any court that convicts¹ a person of an indictable offence may now order him² to pay the taxed costs of the prosecution³. A similar power has long existed in case of non-indictable offences (*supra*, p. 436). And, on the other hand, there are a few exceptional cases in which a private prosecutor, if the trial has ended in an acquittal, may be ordered to pay the taxed costs of the defence. The principal instances of this are where a persistent accuser has, under the Vexatious Indictments Act⁴, been at his own demand bound over to prosecute; or where the prosecution is for a defamatory libel⁵; or where an accusation (of *any* indictable offence) has not only been dismissed at the preliminary examination by the justices, but has been pronounced by them to have not been "made in good faith⁶."

(c) The common law knew nothing of orders for Damages in criminal proceedings; as they are instituted for punitive

¹ Even though it inflict no punishment beyond binding over; C. C. C. Sess. Pap. CLVII. 453. The prosecution must convince the court that the defendant has adequate means to pay the costs.

² For *felonies* this had been permitted by the Act of 1870 (*supra*, p. 95), before which a conviction for treason or felony caused a forfeiture of the prisoner's goods. And a sentence of death for treason or felony involved, as a necessary consequence, an "attainder" (4 Bl. Comm. 374). A person attainted (*attinctus*, "blackened") became dead to civil rights; his lands were forfeited, and his blood was "corrupted," so that descent could not be traced through him. These consequences were abolished by the Forfeiture Act. But an attainder may still be produced by a judgment of outlawry; though such judgments are, in practice, obsolete. The last was in 1859.

³ The court will probably fix a maximum to the amount to be thus paid by the person convicted, e.g. £1000 in *Rex v. Morriss* in Dec. 1925.

⁴ 30 and 31 Vict. c. 35, s. 2; *supra*, p. 471.

⁵ 6 and 7 Vict. c. 96, s. 8.

⁶ 8 Edw. VII. c. 15, s. 6 (3).

and not compensatory purposes. But a great economy of time and money is effected whenever a single judicial investigation into any wrongful transaction can be made to cover all its consequences, reparative as well as penal. Hence the French code freely permits the appearance, at criminal trials, of a *partie civile* to claim damages against the prisoner¹. An experimental, and therefore very limited, step in this direction was taken by the Forfeiture Act, 1870²; which in cases of felony empowers the court to order a convicted prisoner to pay a sum not exceeding one hundred pounds, by way of compensation for any loss of property suffered by any person through the felony. Thus a prisoner convicted of forging a bill of exchange may be made to repay to the prosecutor money which he has lost by discounting it. But the clause, being limited to losses of property, does not extend to injuries to the person³.

9. *Reversal of Judgment.*

Along with the steps which may be taken at this stage to secure a revision of any supposed error in the judgment, it may be convenient to recall those other modes and occasions of appealing to higher tribunals which we have already noticed at earlier stages of the ordinary criminal procedure; as the student will thus obtain a general view of the subject. The following are the prisoner's opportunities, at the various successive stages, of defending himself against errors of law.

I. Before trial.

(a) A motion to quash the indictment; for insufficiency apparent on the face of it. As the court has a discretion to refuse to quash an indictment, even for a valid objection, there is no appeal from the refusal; and the prisoner, if he

¹ "L'action civile peut être poursuivie en même temps et devant les mêmes juges que l'action publique" (*Code d'Instruction criminelle*, art. 3).

² 33 and 34 Vict. c. 23, s. 4.

³ For the power to award compensation (a) when dismissing trifling charges—if in summary proceedings, up to £10 only—see pp. 95 and 438; (b) on convicting for malicious injuries to property, see p. 167.

wishes to press his objection, must do it by demurrer, or else wait till after trial.

(b) A Demurrer¹; alleging, similarly, that the indictment is on the face of it insufficient. The court has no discretionary power of refusing to hear objections raised thus; but demurrers involve such disadvantage that they are unfamiliar now.

II. After trial.

(a) A motion in arrest of judgment; for any objection in *law* that appears on the face of the record (unless it be merely formal). A felon as we have seen (*supra*, p. 486) is *asked* if he raises such objection.

(b) An application to the Court of Criminal Appeal.

The creation of a general Court of Criminal Appeal², by the Criminal Appeal Act of 1907³, constituted a revolution in the administration of our penal justice. Previously (except⁴ for cases tried in courts of a merely summary jurisdiction) the general principle had been that in criminal cases—unlike civil ones—no appeal was allowed to either party upon any question of Fact. And even on questions of Law the Crown had little opportunity of appeal and the prisoner not⁵ an unlimited one. If a jury wrongfully acquitted a man, the Crown had, as it still has, no redress. If it wrongfully convicted him, his only resource was to apply to the Home Secretary for a pardon—a derogatory form of redress for an innocent man. The Act of 1907 does not enlarge the Crown's opportunities of appeal; but it greatly extends those of every prisoner convicted⁶ upon a trial by jury. (To convictions at Petty Sessions⁶, or on trials by the Lords, it does not apply.)

(A) In the rare cases where his offence is the merely quasi-criminal one of obstructing a highway or bridge or navigable

¹ *Supra*, p. 473

² *Supra*, p. 425.

³ 7 Edw. VII. c. 23.

⁴ *Supra*, pp. 442-3.

⁵ Or pleading guilty. But *not*, now, if found "Guilty but insane"; *Felstead v. Director P. P.*, L. R. [1914] A. C. 534. *Supra*, p. 60 n. 3.

⁶ Except as to the sentences on "Incorrigible Rogues" (*supra*, p. 327), or on "juvenile adults" (p. 438 n.), sent from Petty to Quarter Sessions.

river, he has the full right of appeal as in a civil action; s. 20 (3).

(B) And even when the offence charged is a truly criminal one—as in almost all cases it will be—he nevertheless has (s. 3)

(1) an *absolute* right to appeal on any question of pure law¹;

(2) a right, *in case of* his obtaining leave either from the judge who tried him or from the Court of Criminal Appeal itself or from one of its judges², to appeal on any question of fact, or of mixed fact and law;

(3) a right, *in case of* his obtaining leave from the Court of Criminal Appeal or from one of its judges, to appeal against the sentence passed on him (unless, as in murder, the sentence is one fixed definitely by the law)³.

A prisoner who desires to appeal should—s. 7 (1)—give notice of his desire within ten days after his conviction; but the Court may⁴ grant him an enlarged time. Accordingly—s. 7 (2)—any sentence of death, or even of corporal punishment, is not to be carried out until the ten days, or the enlarged time, be over; nor until the appeal, if then instituted, be disposed of. If the prisoner be poor, the Court may assign him, at the public expense, a solicitor and a counsel. Applications for leave to appeal are usually made in writing; the appellant has no right to be present. He has, however, a right to be present at the hearing of the actual appeal, unless it be on a matter of pure law. At actual appeals the Director of Public Prosecutions must—s. 12—see that the prosecutor is duly represented.

On every appeal, or application for leave to appeal, the judge who tried the appellant must furnish to the Court his

¹ But the Registrar of the Court—s. 15 (2)—may bring before it promptly any appeal on a purely legal point that seems to him untenable; and the Court may deal with it at once, without hearing arguments.

² From his refusal an appeal lies to the full Court.

³ No leave is needed as to *sentence* of “Preventive Detention”; p. 508.

⁴ Except in the case of an offence punishable with death.

notes of the trial and a report giving his opinion upon any points arising in the case (s. 8). (Or, if the appeal involves only a question of pure law, the Court may require the judge to "state a case" as in the old practice of the Court for Crown Cases Reserved; s. 20.) And in view of the possibility of an appeal, shorthand notes are to be taken, at the public expense, of every criminal trial before a jury¹ (s. 16); thus rendering universal a practice which, by the sedulous caution of the City of London, had been in force at the Old Bailey for nearly two centuries. Moreover the Court, when dealing with the appeal, are empowered (s. 9) to order the production of documentary or "real" evidence, and to receive evidence from witnesses, whether they were called at the trial or not, either in open court or by depositions for the purpose. (But new evidence, not given at the original trial, is never to be made a ground for *increasing* the sentence.) They may also, if necessary, appoint some expert, *e.g.* a chemist or a specialist in lunacy, to act with them as an assessor; or appoint a special commissioner to report to them on any question which involves such a scientific or local investigation, or such a prolonged examination of documents or accounts (*e.g.* in cases of embezzlement), as cannot conveniently be conducted before themselves. Provision is made (ss. 12, 13) out of public funds for all the expenses connected with an appeal, including even those of the appellant's own attendance. It thus costs him no money to appeal.

Groundless appeals, such as impede so greatly the administration of justice in the United States (see p. 506 n.), are discouraged by various provisions². There is, for instance, the

¹ These do not include the speeches of counsel (unless the judge order it, so as to make clear what issues are actually raised). Yet they are costly. Mr Ashton, K.C. says, "I have known a hopeless appeal cost the country a three-figure bill for transcripts" of the shorthand notes.

² Nevertheless, in 1924, Avory, J., declared the Court to be habitually "burdened with frivolous appeals." In a case "frivolous to a marked degree" the Court had (April 16, 1923) to peruse six hundred pages of transcripts. "Ninety per cent. of the applications are frivolous"; 15 Cr. App. R. 542. And many of the successful appeals release, on a mere technicality, men who are guilty.

necessity of obtaining leave to appeal, whenever the point is not one of mere law. There is also a provision, s. 4 (1), that, even where the appellant is technically in the right, his appeal may be dismissed if "no substantial miscarriage of justice has actually occurred," and the jury not only might, but *must*, have convicted even if the law had been duly followed. A fact, for instance, has been elicited by an improper leading question; but the fact was of no moment. There is, further, in the case of appeals against a sentence, a power—s. 4 (3)—for the Court to alter that sentence by increasing instead of diminishing it. Moreover although, between the institution of an appeal and the decision of it, the appellant escapes the treatment of an ordinary prisoner¹, (being merely detained in a very lenient custody or in rare cases admitted to bail), yet this period will not count (except by special order of the² Court) as any part of the punishment. So any man who appeals on untenable grounds postpones thereby the time of his final return to liberty.

But if—s. 4—a substantial miscarriage of justice has occurred, (whether from the judge's wrong decision of a question of law, or from the jury's having returned a verdict incapable of being supported when regard is had to the evidence³, or from any other cause), then the appeal will be allowed, the conviction quashed, and a judgment of acquittal entered⁴. If the conviction were for theft, the Court can review not only the conviction but also—s. 6 (2)—any order that may have been made for the restitution of the property alleged to have been stolen.

If the appellant has not objected to his conviction, but only to the severity of his sentence, the Court may quash that

¹ If he be under two concurrent convictions and appeal against only one of them, yet both sentences are thus suspended.

² Which is never made in any case where the grounds of appeal are so slight that leave to appeal was originally refused; 16 Cr. App. R. at p. 90.

³ If the verdict be *unreasonable*; cases merely weak are not retried.

⁴ But a New Trial, unfortunately, cannot be ordered (except after a merely abortive one); even though the prisoner be clearly guilty.

sentence, and pass instead "such other sentence (whether *more* or less severe) as they think ought to have been passed"; s. 4 (8). It will not quash a sentence unless it be so excessive as to shew an error of Principle. If, on *any* appeal, the Court finds that, though the appellant did commit the crime, he did so in a condition of irresponsible insanity, they may quash the conviction, and commit him to custody as a criminal lunatic. As to appeal from a verdict of Insanity, see p. 60 n. 3 *supra*.

The decision pronounced by the Court will usually be final¹. But in those rare cases, where a point of law is raised which is of such exceptional *public* importance that the Attorney-General certifies that it is desirable to have the highest decision on it, that certificate will enable either party to take the case from this Court directly to the House of Lords; s. 1 (6).

The Act leaves untouched the Crown's prerogative of mercy; and the Home Secretary will thus still be able to institute inquiries of his own, in which he will be free from the technical rules of evidence, and also will be able to consider pleas for mercy based upon grounds which a court of law cannot accept. Or he may instead (s. 19) refer to the Court of Criminal Appeal either the whole case, or any special point in it.

The Act does not extend to Scotland or Ireland. But in 1925 a Departmental Committee found its working to have been so successful that they recommended its extension to Scotland.

The Act has conferred great benefits, by remedying mis-

¹ But its decisions (like those of the Judicial Committee and unlike those of the House of Lords) are *not* absolutely binding on itself; cf. the effect of Cr. App. R. 2. 62 on 2. 51; and of 12. 81 on 12. 44; and of 14. 17 on 4. 64; and of 18. 81 on 14. 141. Indeed of all the forms of English judiciary law, whilst real property law is the most stable, criminal law is the least so. "Criminal law," says Sir Harry Poland, "is an essentially fluctuating thing...since our judges rightly interpret it in accordance with the spirit of the age." For "the static mind of the lawyer," as Sir Clifford Allbutt puts it, "must perforce come to terms with the dynamics of the biologist"; or, we may add, of the sociologist.

carriages of justice¹ and (still more) by removing the former public anxiety as to the possibility of such miscarriages. It has also raised the level of summings-up, and has done something towards standardising sentences. And it does not seem to have weakened that sense of responsibility in the minds of jurymen which is the great safeguard of accused persons. Countless are the acquittals that have been secured by the influence of those impressive words—still used, though now unjustifiable—"Remember that your verdict is final."

10. *Reprieve, and Pardon.*

The execution of the sentence may be postponed by a Respite of it, *i.e.* a Reprieve of the offender; or be altogether remitted by a Pardon.

Postponements may be granted not only by the Crown but even by the judge. For except in cases of murder, a judge of assize may not only delay² the delivery of his judgment, but may even, after delivering it, delay its execution. And, in the case of capital sentences, it is his imperative duty thus to respite it if the prisoner be proved either to be insane or to be pregnant³. But a Pardon lies beyond all judicial discretion, and can be granted by no authority below that of the Crown itself⁴. It may be absolute, or be subject to some condition⁵,

¹ At present, about six per cent. of the persons convicted on indictment try to avail themselves of the Act. But scarcely one-eighth of these finish with *any* degree of success. *E.g.* in 1923, out of 6541 persons convicted on indictment, 373 applied for leave to appeal, of whom 59 obtained it; 33 others appealed as of right. Of these 92 appellants, 44 gained nothing; and some of the others only little. Thus our jury-courts make but few blunders.

² *E.g.* in order to see if restitution is made; or, again, even when only a binding-over or a discharge is contemplated, in order to visit the offender penally with some inconvenience, whilst avoiding the disgrace of an actual sentence of Imprisonment.

³ The reprieve for pregnancy occurs as early as A.D. 1348; *Statham, Corone*, 65, 78.

⁴ *Anson on the Constitution*, II. 2. 27. The Crown can review the whole history and condition of the offender; and even take into account popular emotion, as when in Lee's case, at Exeter some forty years ago, the damp gallows had thrice failed to act.

⁵ *E.g.* the pardons which introduced transportation; *supra*, p. 489. Or the pardon granted, about 1730, to a condemned criminal on condition that

or only "remit" a portion of the punishment, or "commute" it to a milder form. Pardons may be granted by the King for all crimes, except two. For (a) under the Habeas Corpus Act the King cannot pardon the offence of sending a prisoner out of England to evade the protection of the writ of habeas corpus¹; and (b) even at common law, he cannot pardon a person convicted of a common nuisance until after the nuisance has been abated², for such a pardon might prejudice the rights of the private persons injured by the nuisance³. Moreover⁴ upon an impeachment by the House of Commons, a pardon by the Crown cannot be pleaded as a defence so as to prevent the trial; though it does save from punishment. A breach of the statutes of a corporation (*e.g.* a University or a college) is not a "crime"; and so is not within the Crown's power of pardon (2 Str. 912; *Dr Bentley's Case*).

It has often been maintained that a perfect code would remove all necessity for a power of pardon. "Happy that nation," says Beccaria, "in which clemency shall come to be considered dangerous." But long experience has shewn that human foresight is incompetent to frame, and human language to express, a faultless scheme of legislation. The power of pardon therefore is one which is indispensable to the wise administration of penal justice⁵. Yet it is a power which, if exerted to the full, would suffice to overthrow the whole fabric of the criminal law; for mercy to the Few may be cruelty to the Many. President Taft found that this power "must be wielded skilfully, lest it destroy the prestige and supremacy

he would allow the great surgeon Cheselden to perforate the drum of his ear, that the consequent effect upon hearing might be ascertained.

¹ 31 Car. II. c. 2, s. 11.

² *Supra*, p. 15.

³ Contrast the converse rule that it is only *before* any informer has commenced an action that the Crown can grant a pardon in the case of conduct forbidden under some penalty recoverable in a civil action by a common informer; *supra*, p. 16.

⁴ By the Act of Settlement (12 and 13 Wm. III. c. 2).

⁵ The power has, on an average, been exercised in about three hundred cases a year; but only four per cent., or less, of these are *complete* pardons. In 1923 only in 188 cases; and *no* complete pardon. Very rarely (in 1923 only once) is the remission due to any doubt as to the justice of the conviction.

of Law¹. Sometimes the President is deceived in his exercise of it. I was." (*Ethics in Service*, p. 60.)

THE SOCIAL RESULTS

Four and a half centuries ago, Chief Justice Fortescue laid down the fundamental rule—"I could rather wish twenty evil-doers to escape than one man to be condemned unjustly" (*De Laudibus*, ch. xxvii.). The outline I have given of the English law of criminal procedure and evidence may serve to shew how effectually its rules are now moulded into a shape that affords the amplest practicable security against the unjust condemnation of any innocent man². Accused persons find themselves protected by the humane attitude of the judge³ and of the prosecuting counsel, by the right to a "dock defence"⁴; by the freedom conceded to the prisoner's counsel; by the publicity of the proceedings and the right of reporting them⁵ to a still wider public; by the stringency⁶ of the rules which prescribe the quantity and the character of the evidence which the Crown⁷ must produce; by the facilities for securing witnesses for the defence at the cost of

¹ King George V's accession was celebrated by partial remissions of sentences to 11,873 offenders! Whilst her predecessor had in four years of office pardoned only seventeen criminals, Mrs Fergusson, the governor of Texas in 1925-26, pardoned 3500 in two years.

² Berry, the executioner, says in his memoirs that, of the 140 persons he had hanged, all but three *expressly* admitted to him their guilt.

³ See M. Cruppi (p. 50), and M. de Franqueville (ii. 389, 477, 687).

⁴ *I.e.* the right to call upon any counsel practising in that court whom he may see there (however eminent) to undertake his defence for the modest fee of £1. 3s. 6d. In July, 1921, at the C.C.C., a conspiracy case in which a "dock-brief" was given with this small fee, lasted twenty-three days.

⁵ Pollock on Torts, c. vii. s. 3. "*Les journalistes, c'est là le vrai et utile public*" (De Franqueville, ii. 698). The local newspapers' reports are the great check on Petty Sessions. See Hansard, June 25, 1812, for Romilly's regret that Quarter Sessions *then* lacked that check.

⁶ Even as far back as 1722 (as appears in *Bishop Atterbury's Case*) lawyers noticed that English courts required a greater "certainty of evidence" than continental courts did.

⁷ A stringency which is often relaxed in favour of the accused. "So much latitude is now given to prisoners as almost to create a second standard of the admissibility of evidence" (Shearman, J., July 14, 1924). Cf. Cr. App. R. 8. 76; 10. 164. "If a point of evidence is a near thing, I never decide it against the prisoner" (Lord Darling). And even clearly admissible evidence is sometimes excluded in his favour; 9 Cr. App. R. 244; cf. 20. 51.

public funds; and by the rejection of all convictions from which even a single juror dissents¹. In the sense of security against miscarriages of justice² thus inspired in the nation at large, we may find adequate explanation of an anomaly which has often surprised foreign observers of English institutions. They have remarked that our criminal courts, the courts which come most violently into conflict with the interests of the defendants against whom they adjudicate, are not—as would seem natural, and as has actually been the case in many countries—the most unpopular of all our tribunals, but the least so. Moreover the confidence universally felt, that every accused person will be tried by a fair method and in a fair spirit, goes far to facilitate the protection of life and property, by rendering it easier in England than in many countries for the police to obtain

¹ An instructive contrast to this picture may be found in Mr H. B. Irving's *Studies of French Criminals*. He maintains that, in spite of the great legal genius of the French, their administration of penal justice is imperilled, in one direction by "absence of true cross-examination, loose rules of evidence, and almost unavoidably partial judges," and in the other by "undue licence in advocacy, and emotional juries" (p. 126). He describes modern French practice as requiring the judge's questioning of the prisoner at the public trial to be "a caustic, dramatic and closely reasoned presentation of the case for the prosecution, to which the prisoner must make the best reply he can" (p. 309)—a vivid contrast to the English prisoner's right of utterly refusing to be questioned. This description is corroborated by M. Cruppi (*La cour d'Assises*, Paris, 1898, p. 133), who says: "Le président, par son interrogatoire passionné, pendant de longues heures, se fait l'auxiliaire de l'accusation." Yet that interrogation is not required by the Code but is merely a creation of custom. A French jurist of the highest authority, the Comte de Franqueville, in his elaborate treatise on *Le Système judiciaire de la Grande Bretagne* (Paris, 1893), admits that the French preliminary examination, conducted in private, is far from satisfactory; that the form of the *acte d'accusation*, with its recital of every unfavourable point in the prisoner's antecedents, prejudices the accused in the eyes of the jury; that the interrogation of the prisoner by the presiding magistrate is often open to criticism; and that it might be better if counsel for the defence were allowed to cross-examine witnesses directly, instead of being confined to suggesting questions for the Court to put.

² J. D. Lewis (*Causes célèbres de l'Angleterre*, p. 10) states that, after a wide study of English criminal trials from the time of James II., he found only three cases in which any person had been actually executed, who had afterwards been proved quite innocent; viz. the clear cases of Shaw (executed at Edinburgh in 1721 for the supposed murder of a daughter who had in reality committed suicide), of Jennings (executed at Hull in 1762 for theft, by a mistake of identity), and the much more doubtful case of Eliza Fenning

information and assistance in their efforts to bring criminals to justice¹.

The spirit of fairness and humanity that characterizes English criminal courts is not of recent origin. Recent years have, however, done so much to improve the procedure which this spirit animates, that they have now raised those courts to a unique degree of efficiency. Says an experienced American lawyer², "I prefer the swift and sure, yet careful, methods of English criminal jurisprudence to our own cumbersome, technical, dilatory way of dealing with criminals³."

(executed in London in 1815 for an alleged attempt at poisoning). That of the inn-keeper Jonathan Bradford (executed in 1736 for the murder of a traveller), though a case of legal innocence, was one of moral guilt; as he had entered the traveller's room to kill him, but found him slain already by his own valet.

¹ A high authority at Scotland Yard states (*The Times*, Dec. 1, 1921) that "In England the police can count upon the assistance of the entire public; even, occasionally of criminals themselves. In most other countries, there is a dull hostility against the police." "En Angleterre, tout le monde facilite la tâche de la police. En France, il en est autrement. Nous avons vu un bon bourgeois de Paris recevant les félicitations du préfet de police pour avoir eu le courage de fournir aux autorités des renseignements que même un portefaix de Londres se fût cru deshonoré en cachant. Et puis ce bonhomme de Paris est chassé de son habitation par le mépris des voisins!" (J. D. Lewis, *Causes célèbres de l'Angleterre*, p. 351.) In 1902 all Europe was shocked by the gigantic "Phantom Millions" fraud in France of the Humberts. Yet when, on their flight in Spain, a Spanish gentleman pointed them out to the police, he was consequently expelled from his clubs. At Palermo, in 1910, a hundred persons saw Professor Nicabi assassinated; but none would give information to the police. Moreover French juries acquit a much larger percentage of prisoners than English ones do. (*Cr. Jud. St. of 1896*, p. 27.)

² Fishback's *Recollections of Lord Coleridge*, p. 55.

³ President Taft said in 1911 that half of the *guilty* men tried there were acquitted. Cf. President Coolidge's official address of May, 1925. "Lynch law" was partly due to dissatisfaction with the uncertainties of the forensic administration of justice. "When citizens," said Filangieri long ago, "see the sword of justice idle they snatch a dagger." In 1889-1918 there was in the United States an annual average, now rapidly diminishing, of 107 lynchings (95 per cent. of which were in the Southern States); whilst the annual average of executions by process of law was less than three-quarters of that number. "In no other country is the deterrent effect of punishment so vitiated by delay, chicanery, and futile appeals"; *Autobiography of President A. D. White*, i. 137; cf. ii. 77, 504. These appeals sometimes continue through two or even four years. See also Thayer on Evidence, p. 528. In June, 1922, the American Bar Association convened a meeting of jurists to devise reforms of procedure to check "the vast wave of crime now sweeping over the country." Its committee reported that at least 8500 murders occur annually in the United States. The number reported to the English police never reaches 180.

CHAPTER XXXII

ORDINARY PROCEDURE

III. DETENTION AND PROBATION

OUR review of the long-accustomed forms of Punishment, all of them instituted mainly for Deterrence, must be supplemented by consideration of three recent methods of dealing with convicted offenders, which aim instead at Seclusion or at Reformation. They are intended, not for the average criminal, but for those who are either worse or better—less capable or more capable of reclamation—than he.

In the reaction of the nineteenth century against penal severities, a theory arose that punishments should be solely directed to the Reformation of the offender. But protracted experience has shewn that noble aim to be far more difficult of achievement than this theory pre-supposed. The great number of Recidivists, a number now increasing in almost every country¹, sufficiently attests this. Thus in England, the number of persons in prison again, after four or more previous convictions, was 32,781 in the year 1891: but it had risen in 1909 to 57,591². Now the great object of criminal law is to prevent crime. Hence, if any particular offender has been convicted so frequently as to make it clear that he cannot be kept from crime through the medium of either reformation or deterrence, it remains only to effect that prevention in a

¹ That the mere *proportion* of reconvicted to first-convicted prisoners should be on the increase is, of course, a hopeful sign; as shewing that fewer persons are falling from innocence into crime. But not that the actual *number* of reconvicted prisoners should increase. Happily it is now diminishing in England; being only 30,625 in the year 1927, as against 101,472 in 1911-12, despite the great improvement meanwhile in methods of identification. It is noteworthy that the greater the degree of recidivism, the greater is the proportion of female recidivists in that degree.

² Happily of the persons sent to prison in 1927 only 18,862 had been *thus* often convicted before; whilst in 1913 the corresponding number had been 53,372.

direct way, by placing him in a seclusion where it will be impossible for him to repeat his offences. Unless so secluded, he will not only continue his offences, but will also train others to offend, and will moreover transmit his aptitudes to a tainted posterity. "The interests of justice are sacred; the interests of the offender are doubly sacred; but the interests of society are thrice sacred" (Anatole France). For social safety, it has been made possible, by the Inebriates Act, 1898, to seclude for three years those offenders whose cravings for alcohol have proved to be incorrigible¹. A similar seclusion is still more necessary in the case of similarly incorrigible cravings for crime. If we cannot deter from it, we must debar from it. Hence in France, a criminal whose record shews him to be thus hopeless, must be placed in perpetual *relégation*, in a penal colony. Accordingly the Prevention of Crime Act, 1908 (8 Edw. VII. c. 59) enables the court which sentences to penal servitude a person whom a jury has convicted of felony², and has also pronounced to be an "habitual criminal³," with at least three previous serious convictions since the age of sixteen, to add a further⁴ sentence of merely "Preventive Detention" after the end of the penal servitude. This detention may be for any period between five years and ten (but not, as the Bill at first proposed, for life). It goes on under treatment less rigorous than in prisons; *e.g.* as to hours, food, visits, recreation, and earnings⁵. It will be

¹ Against the once notorious Jane Cakebread, who died in 1898, 281 convictions for drunkenness stood recorded; Eleanor Larkin underwent her 228th in 1920. Lord Herschell mentions a woman who underwent 404 imprisonments for drunkenness.

² Or of coining, false pretences, conspiracy to defraud, or being found by night about to commit burglary.

³ If the indictment has charged him with this "habitualism"; which it can only do by consent of the Director of Public Prosecutions. Consent is not given unless the man has already undergone penal servitude once; and is over thirty; and the present offence is grave.

⁴ The offender can (*supra*, p. 498 n.), without leave, appeal against this.

⁵ By 1928, 160 persons were already actually undergoing it; and during 1927 some 42 were sentenced (prospectively) to it. About half are aged over forty; and about half have undergone more than ten convictions.

practically that of a Farm Colony. The cases are periodically considered with a view to discharge on licence; but of the men released the proportion that have done well is "very small" (Troup's *Home Office*, p. 123). Cf. p. 534 *infra*.

Such old offenders as these are usually beyond reclamation, but young ones are exceptionally capable of it. Thus good results have long been obtained by sending boy-criminals to Reformatory Schools instead of to prisons. The experiment of a similar treatment of older lads was tried in 1902 at Borstal Prison, near Rochester. Its success led to the passing of s. 1 of the Prevention of Crime Act, 1908; under which an offender who has attained sixteen but is not yet twenty-one—a "Juvenile Adult"—when convicted on indictment of a crime punishable by imprisonment, may be sent for not more than three years, or [now] less than two, to "detention" as an "inmate" of a "Borstal Institution," instead of to prison. In 1925 the judges declared three years to be the desirable minimum. By the C.J.A. Act 1914, s. 10, and 15 & 16 Geo. V. c. 86, 46 (1), even a court of summary jurisdiction may send a *reconvicted* juvenile adult, whose new offence is one punishable with at least a month of prison, to assizes or sessions; which can decide for or against Borstal treatment for him. There are now five Borstal Institutions; and during 1927 there were sent to them 568 youths and 84 girls. They receive physical, industrial, and moral training¹. Good behaviour is rewarded by enjoyment of a Summer Camp². After two years, they are usually released on licence and pass the next two years under the supervision of an admirable Society—the "Borstal Association." Its more than a thousand Associates (many of them unpaid) afford to these licencees the assistance and advice that ex-prisoners receive from the excellent Discharged Prisoners' Aid Societies. And about three-fourths of the Borstalians pass through these two years

¹ In prisons themselves a kindred course is now followed in the "Young Prisoners' classes" (formerly called "Modified Borstal treatment"), for those between nineteen and twenty-one.

² In 1928, 495 enjoyed it.

of freedom without committing any offence against the law; and even of those who have been at liberty for eleven years a majority have proved equally law-abiding. Some six thousand persons have now undergone Borstal treatment; and only about 35 per cent. have again been convicted. As many of them are mentally or corporeally defective, these results surpass expectation.

Borstal treatment is not for those physically weak; nor for first offenders or other novices in crime; but for hale lads who have been imprisoned and have obviously taken to a career of lawlessness. Anyone, whether youth or adult, who has committed only a single offence, and that a trivial one, can usually be checked effectually by a simpler method. It has long been a practice of the judges—where a convicted offender's character and surroundings make it desirable—to release him without immediate punishment; but bind him to appear for his sentence should his conduct make this necessary, and to be of good behaviour meanwhile. (See 30 St. Tr. 1130 for an instance in 1809.) To commend this practice, and to approve its exercise even in courts of summary jurisdiction, s. 16 of the Summary Jurisdiction Act, 1879, was passed. The matter is now regulated by the Probation of Offenders Act 1907 (7 Edw. VII. c. 17). Under this statute, any court, whether of summary or of higher jurisdiction, which considers that, though an offence is proved, it is inexpedient to inflict actual punishment, may release the offender on recognizances to be of good behaviour and to appear for judgment, within a time not exceeding three years, *if* called on. It may also order him to pay damages (not exceeding £25 if it be a summary court) and costs. The Court may attach conditions to the recognizance; *e.g.* as to restitution, residence, intoxicating liquor, entering a Farm Colony or a Refuge or an Inebriates' Home, or even quitting Great Britain. It may, in addition, place him under the supervision of a Probation Officer; whose duty will be to visit him periodically, report on his behaviour, and “advise, assist, and befriend

him." If he behaves badly, he may be fined £10, or receive sentence for his original offence. A court of summary jurisdiction may even release him without recognizances¹. In 1927 the Act was applied to one-half of the persons against whom indictable offences were *summarily* proved; whilst of these half were put under Probation Officers. In all, 15,989 were so put (96 per cent. of them by petty sessions), nearly half of them being aged under sixteen. Barely five per cent. of the probationers offend again within the same year². Cf. p. 525 n. 1 *infra*.

This lenient release is not appropriate where the first offence is one of great gravity³, like coining or forgery or doing grievous bodily harm. Its indiscriminate application is apt to produce in the locality an impression that every person may commit *one* crime with impunity. Nor is it appropriate when a person who has already been on probation commits a second offence, even a slight one. In France the application of similar leniency upon a third or even a fourth offence is said to have "volatilisé" the criminal law in some districts. Obviously this light treatment must have some tendency to encourage crime; both by the offender's prospect of comparative immunity and also by the victim's reluctance to undertake the trouble of prosecuting for a result so slight.

But for a first offender, whose offence is not a heinous one,

¹ Probation usually varies between half a year and two years.

² Mr Wheatley, invaluable in London courts, was during 1908-24 the probation officer to 2629 persons. He stated that "the great majority" of them have done well *permanently*. A probation officer's task is nevertheless a difficult one. A departmental committee in 1922 reported that thorough success in it requires "a keen missionary spirit based on religious convictions"; as with Mr Wheatley. A kindred system of "Liberté surveillée," established in 1912 in France, has worked disappointingly; partly from being applied too indiscriminately, and partly from the lack of supervisors, especially of good ones. At a conference of jurists in 1925 it was stated, without contradiction, that out of the 300 supervisors in Paris only twenty worked efficiently.

³ On Oct. 26, 1925, the C. C. A. in two bad cases of theft by first offenders, confirmed sentences of nine months and of twelve months; and one of three years' penal servitude on a second conviction.

it is desirable to avoid imprisonment¹. Prisons are a great deterrent to those who have never been in them; but often have little terror for those who have had actual experience of their comforts². And their effect on the young is apt to be³ degrading. Too often have juvenile offenders "entered gaol as Imps, but come out of gaol as Devils." Hence when his case cannot be met by a fine, a first offender is often sufficiently punished by the disgrace of the public exposure to make it well to dispense with any graver immediate punishment. A stigma has accrued and has to be lived down⁴.

Should the offender be again brought before the court, charged with having violated the conditions of his recognizances or having committed a second offence, the charge must be proved by sworn evidence, and the accused be allowed to cross-examine and give evidence on oath and call witnesses. But the question is not for a jury but for the court.

The success of Probation is now so clear that the Criminal Justice Act, 1925, ss. 1 (1) and 2 (1, 2), requires every Petty-Sessional Division to have (1) at least one probation officer, and also (2) a Probation Committee⁵ to supervise him and remunerate him. This comprehensive system will involve a cost of about £100,000 a year; a sum far less, however, and productive of far better results, than Imprisonment would have involved.

¹ But it must be remembered that a first prosecution does not necessarily mean a first offence. In 1925, in a case of first conviction, fifty-one previous offences were admitted and "taken into account."

² Warmth, clothing, regular meals, medical aid, and a clean separate room, are potent attractions to English idlers; as a prison's coolness in summer is to Neapolitan ones. Cf. p. 547 *infra*.

³ Sentences of a fortnight or less (happily seven times rarer in 1924 than in 1909) are long enough to degrade but too short to reclaim.

⁴ On the other hand the prospect of public notoriety does actually attract some vain persons to crime; especially to grave crimes, like attacks on Royalties. Hence Czecho-Slovakia has forbidden publication of the portraits of criminals who attempt to kill any high public official.

⁵ Except in London; where the Home Secretary will act as one.

CHAPTER XXXIII

THE PROBLEMS OF PUNISHMENT

OUR consideration of the various modes of punishment now recognised in English criminal law, may recall the remark (*supra*, p. 36), that neither they, nor the abstract doctrines of Punishment which have given rise to them, can be regarded as having attained a final—or even a temporarily stable—form. Nor can our doctrines as to punishment, and our present modes of inflicting it, be said even to be in logical accord with each other. “All theories on the subject of Punishment,” said Sir Henry Maine in 1864 (*Speeches*, p. 123), “have more or less broken down; and we are at sea as to first principles.” Citing these words in 1924, Mr Justice McCardie added “Again and again I have heard men of juristic distinction express the same opinion.” And in 1925 Lord Oxford, also citing them, added “Nothing has since been said or written that has brought us any nearer to those principles.” Continental jurists express an at least equal distrust as to the systems pursued in their countries. But to Englishmen the importance of arriving at definite principles on this subject is peculiarly great; for our abolition of minimum punishments has given our judges a range of discretion, and therefore of responsibility, not usually entrusted to continental tribunals¹.

One important rule has been laid down by John Stuart Mill²; viz. that, as the Deterrent power of any punishment depends more on what it seems to inflict than on what it actually does inflict, it is well to select penalties that seem more rigorous than they really are. Thus, he adds, Death-

¹ Cf. Franqueville, II. 706. Sir Raymond West has described an instance in which, under the rigid minima of the French Code, it had been necessary in Egypt to sentence a boy who had stolen a turnip to three years' imprisonment. *Supra*, p. 492.

² *Hansard*, April 21, 1868.

penalties in fact are less cruel than any penalties which modern legislatures would be likely to substitute for them. Less cruel, we may add, for instance, than the "living tomb" of perpetual subterranean isolation to which the Swiss law consigned the assassin of the Empress of Austria.

Yet, though Penology is still an incomplete science, it is an ancient one. The experience of centuries rendered familiar, long ago, various leading considerations which habitually affect the minds of legislators in determining the maximum penalty for any given class of offences, and the minds of judges in determining the particular penalty to be inflicted in any given instance. Thus the ancient Roman lawyers enumerated¹ seven points to be taken account of: 1. *Causa*, e.g. wanton aggression, or parental chastisement; 2. *Persona* (both of offender and of victim); 3. *Locus*, e.g. sacrilege or not; 4. *Tempus*², e.g. night or day; 5. *Qualitas*, e.g. open theft or secret; 6. *Quantitas*, e.g. theft of one sow or of a whole herd; 7. *Eventus*³, e.g. mere attempt or consummated crime. Practically speaking, the Offence itself, and the Offender.

I. As regards the Offence, account must be taken: (1) of the greatness or smallness of the evil likely to result from acts of its class⁴; (2) of the facility or difficulty with which it can be committed⁵ or, again, with which it can be detected; (3) of the frequency or rarity with which, at the particular time concerned, acts of this class are being committed⁶;

¹ *Dig.* 48. 19. 16. The passage, which is a striking one, is the only extant fragment of Claudius Saturninus, an Antoninian magistrate. Cf. an admirable corresponding enumeration of topics made by Blackstone (4 Comm. 13).

² The Code made in 1892 for Samoa provides (chap. φ), that "If any one breaks a law on a *Sunday*, this aggravates the act."

³ At Lagos men, convicted of murder, urged "But we did not *eat* her."

⁴ Hence (*supra*, p. 279) the severity with which treason is punished, or a sentry's sleeping on duty; even when the ethical guilt is small.

⁵ Hence the severity with which servants are punished for thefts of their employers' property; and the leniency usually shewn to the rank and file after the suppression of a great rebellion.

⁶ Frequency mitigates the wickedness, but increases the need for deterrence. Conversely, the fact that felonies against property have (in proportion to population) fallen to less than half of what they were a generation ago, has made possible the lighter sentences which are now inflicted for them.

(4) of the aggravating or extenuating circumstances which accompanied this particular act—for instance, (α) the victim, as where a woman or a child is assaulted, (β) the place¹, (γ) the time²; (δ) the company, a crime being more dangerous if committed by a group of men than if by one alone.

II. As regards the Offender himself, account must be taken: (1) of his age³, health and sex³; (2) of his rank⁴, education⁵, career, and disposition⁶ (previous offences of the same kind count more in raising sentence than do those of a different kind); (3) of his motive; (4) of any temptation⁷, or intoxication (*supra*, p. 61), under the influence whereof he acted; (5) of his susceptibility⁸ to punishment, *e.g.* an imprisonment meaning much more, but a fine meaning much less, to a nobleman than to a ploughman; (6) of the evil which the judicial proceedings have inflicted on him already, *e.g.* his imprisonment whilst awaiting trial⁹.

Numerous as are these determining circumstances, a complexity is introduced by the fact that the same circumstance does not always operate in the same way. We have already (pp. 34, 35) noticed this in the conspicuous instance of

¹ Cf. pp. 171, 219, *supra*.

² Cf. p. 176, *supra*.

³ Of our grave offenders, women form only one-tenth.

⁴ See 16 Cr. App. R. at p. 194. Privilege augments Responsibility.

⁵ To have had a good education and done well at College is often urged in mitigation. Yet it may aggravate guilt; "he ought to know better."

⁶ The practice of diminishing a sentence because the accused has pleaded guilty or has made restitution or has disclosed the whereabouts of the stolen property (cf. 15 Cr. App. R. 81, 85, 95) may be justified, even in theory, by regarding this attitude of his as proof of a penitent disposition; and so (as Lord Bacon says) "a footstool for mercy." He deserves credit for making a clean breast of it; or, again, for not having gone into the witness-box to perjure himself.

⁷ Cf. p. 34, *supra*; and p. 547, *infra*.

⁸ In 1896 I heard a prisoner urge, in mitigation of sentence, "Whenever I've been sent to prison before now, it has always been for such a very long time."

⁹ But the habitual practice of taking any such preliminary detention into account, in sentencing a convicted prisoner, (the whole period being now usually deducted from a sentence of imprisonment, see 2 Cr. App. R. 149), requires, as its logical consequence, legislative provision for affording to acquitted prisoners (if clearly innocent) a pecuniary compensation for similar detention. Cf. p. 533, *infra*.

Temptation; which sometimes extenuates the punishment, and sometimes aggravates it. For, since the aims for which punishment may be inflicted are numerous—deterrent, preventive, reformative, retributive, reparative (*supra*, pp. 30–36)—the effect of a circumstance may vary according to the particular aim which is predominant in the mind of the particular legislator or judge. For example, that the person murdered was the husband or wife of the murderer, is usually regarded as enhancing the wickedness of the crime; yet there are some modern codes which treat it as an extenuation. Indeed, as Sir Samuel Romilly observed, “Often the very same circumstance is considered by one judge as matter of extenuation, but by another as a high aggravation of the crime.” He gave, as illustrations, the facility of the offence, the frequency of it, the fact of the offender’s being a foreigner, or of his being young (which can be treated as a proof either that he is not yet hardened or that he is precociously wicked¹).

Since Romilly’s time, the difficulties surrounding this subject have grown greater instead of less. For the development of a science of Criminology² has disclosed to us the unexpected complexity of the problems of crime. The jurists of the eighteenth century—Romilly himself, for instance, and his masters Beccaria and Bentham—have earned a just fame through their successful efforts to purge mediæval criminal law of its aimless severities, by abolishing mutilations, minimising the number of capital punishments, and reforming the prisons. But experience has shewn that they exaggerated the simplicity of the problem they were dealing with. They treated the human race as if all its members were possessed of equal moral responsibility, except a few

¹ Political motive, similarly, whilst often thought to extenuate (cf. p. 417 *supra*), may well sometimes aggravate. A bank-cashier, who had defrauded his bank, urged in 1909 that “I don’t look upon it as a crime; for capitalists are the ruin of this country.”

² The student may refer to Prof. A. Prins’ admirable treatise, *La Science pénale*, and to Tarde’s *La Philosophie pénale*.

abnormal individuals, all of whom were equal in their abnormality. And they supposed that, if punishment were but aptly selected, the threat of it would effectually restrain all ordinary human beings from crime¹. But, since their time, the experience of three generations has tested their doctrines. The numerousness, in every country, of "Recidivists," who return time after time to gaol, has shewn how exaggerated were the hopes once entertained as to the reformatory effects of well-directed imprisonment. For soul, as for body, surgery is found far less effective than sanitation. The cure of criminal habits is difficult. But the prevention of them is more easy. Nothing, it has been said, more signally marked the reign of Queen Victoria than the diminution of crime². Yet even this recent prevention³ has been effected less by any improvements in the criminal law than by improvements in the social surroundings of the people. Crime has diminished; not so much because people were more strongly deterred from it by the terrors of punishment, as because they were raised further above temptation to it, by better education⁴, purer literature,

¹ Even so experienced a lawyer as Romilly could say (in the speech of Feb. 9, 1810, already cited) "If punishment could be made an absolute certainty, a very slight penalty would suffice to prevent almost any species of crime, except crimes arising from sudden passion."

² The statistics of 1911 shewed a nearly continuous decrease of *indictable* crimes since at least 1857 (beyond which date, accurate comparison is not possible). The annual number of persons tried for them was, in the period 1862-6, 2860 per million of population; but by 1920 had fallen to 1612 per million. Yet in 1926 it rose again to 1986.

³ Which, unhappily, is almost peculiar to England.

⁴ A connection between ignorance and crime is manifested by the fact that in England the proportion of persons who can neither read nor write is six times as high amongst prisoners as it is amongst the general population (judging by the signatures to marriage-registers). In London the proportion of people who have passed beyond Standard IV is more than six times as high as amongst persons indicted. Of 46,807 persons sent to English prisons in 1923, only 3968 could read and write well; and but 307 were of "superior instruction." In France, however, the proportion of grave offenders is greater (as 4 to 3) amongst people who can read and write than amongst adult illiterates; and one in twenty of such offenders is of "superior instruction." (*Compte général* for 1912, pp. xvi, 41, 82.) Education in France is more often purely secular than in England or Ireland.

greater sobriety¹, healthier dwellings², increased thrift, more systematic provision for the events of sickness, accident, and fitfulness of employment, readier assistance for orphans and other destitute children, and new opportunities of elevating companionship³. How much more the criminality of a country depends upon its fiscal and administrative⁴ laws than upon the laws that directly concern crime, has been growing increasingly clear ever since Quetelet first shewed by arithmetical illustrations that the ratio of convictions to population varies both with physical and with economical changes. Familiar examples of this are the decay of smuggling since the reduction of customs-duties, and of piracy since the development of steam navigation. Others are the increase of violent assaults in periods of high wages (as also, for a different reason, in the months of heat); and the increase of thefts in years of bad trade or in the months of winter. Not indeed that poverty, in itself, is a main cause of crime. For the parts of England where there are fewest acts of dishonesty are not those where pauperism is at its lowest⁵; nor are they most numerous where it is highest. But what Indigence does not do, Instability will. Any sudden economic change, which intensifies poverty abruptly, will produce a temporary increase of theft; though it lessens drunkenness, and consequently crimes of violence. Experience of the influence of external causes has led some observers

¹ Statistics at Zurich shew Sunday to have, there, nearly thrice its normal seventh share of each week's crime. Cf. England's drunken Saturdays.

² In Ireland, the ratio of indictable offences to population was in 1900 six times as high in towns as in rural districts. In the several districts of Liverpool, juvenile crime is found to vary in proportion, not to the poverty of a district but to its nearness to open spaces for play.

³ It is rare to find in prison any boy-scout or girl-guide.

⁴ Some truth underlies the exaggeration that "One policeman is worth two gaolers; and one street-lamp is worth two policemen."

⁵ Indeed the very opposite is more nearly the case. Cornwall, extremely high in pauperism, has very little theft; whilst Lancashire and Northumberland have much more theft, yet little more than half as much pauperism. The Prison Commissioners in 1901 found that of 1386 juvenile prisoners only 106 had been led into crime by "want."

of prison-life into extreme generalisations; as when Lacasagne says that "A nation has only just so many criminals as she deserves," or Mr J. W. Horsley that "Crime is only condensed alcohol." We may more safely say that the chief causes of crime are poverty, drink (decreasingly now) and betting (increasingly now); or, as Mr Justice McCardie puts it, "the elemental passions of avarice, anger, and lust."

During the present generation, the reaction against the views of the eighteenth century has carried a very important group of jurists—the "Italian" or "Positive" school of criminologists—into an opposite extreme. Instead of treating nearly every offender as a responsible being, capable of being deterred from crime by the threat of punishment, these writers, all but discarding any idea of deterrence, treat nearly every grave offender as an irresponsible being, the victim of either his nature or his nurture, either his defective cerebral organisation or his unfavourable social surroundings. This "*Scuola Positiva*¹" has formulated a five-fold classification of criminals, grouped accordingly as their respective crimes spring:

- (1) merely from *Passion*;
- (2) from *Opportunity* (the man offending only when exposed to some active temptation and restrained by no external check);
- (3) from acquired *Habit* (usually the result of social surroundings);
- (4) from *Insanity* (in its vast variety of grades, from neurasthenic absence of self-control to active mania);
- (5) from innate *Instinct*² (which these writers regard as usually an atavistic inheritance from some early stage in the development of the human race).

¹ Created by the physician Cesare Lombroso, and the lawyers Garofalo Ferri, and Colajanni. I have written of them in the *Journal of Soc. of Comparative Legislation*, 1910, pp. 220–228.

² Aristotle's "Brutishness"; *Ethics* VII. 5. Like Caliban, "a devil, a born devil, on whose nature Nurture can never stick."

This fifth class, the supposed "born-criminals," intermediate between the madman and the savage, have been subjected to elaborate investigation by these Italian writers; who allege them to be recognisable by pathological signs, visible not only in the skull and skeleton but even in the skin, hair, ears, hands, muscles and eyes. Some Russian psychopathologists have carried this so far as to allocate different colours of the eye to different species of crime; finding, for instance, chestnut-brown prevalent in murderers, and slate-colour in robbers¹.

Of the five groups, the first two are corrigible; but the third (to which most thieves belong) passes easily into incorrigibility, and the fourth and fifth, from the outset, are usually incorrigible². For these last three, therefore, as *déséquilibrés*, the only appropriate treatment is "Segregation," (*i.e.* non-punitive detention in what is rather an asylum than a prison). And this must continue for an indeterminate period³; that is to say, permanently, except when the treatment proves so successful as to bring any particular offender to such a condition of mental health as makes it safe to release him. Meanwhile the detention is to have not only a curative, but also a compensative purpose; being so regulated as to try⁴ to obtain from the labour of the criminal a sum of money which will make amends to the victim of the crime. In the case of offenders of the first two classes the raising of this compensation-money is, indeed, to be practically the sole object of their detention.

¹ I have heard a prisoner (apparently of Lombrosian views) plead in mitigation of sentence that on one foot he had six toes.

² Hence the extreme Lombrosians would seclude such men as soon as their pathological signs are recognised, without waiting until they have committed a crime. But the less extreme would merely use those signs to eke out weak evidence on an actual accusation of crime.

³ Measured, not by the guilt of the Act, but by the obduracy of the Man.

⁴ Hopelessly, however; for a prisoner, even when hale enough to be employed (15 per cent. are not), costs more than he earns. His *gross* earnings in 1920-21 were £44. 2s. 9d. a year; his gross cost for maintenance and supervision £121. 7s. 10d. Thus in 1923-24 a man's *net* cost in prisons was £84. 10s.; in penal servitude, £100. 7s.

In these Italian theories, it is obvious that criminal law, properly so-called, disappears from view; and is replaced by civil law in some cases, and by the art of medicine in others. The writers of this school have certainly rendered great services by drawing attention to the necessity of distinguishing between different types of criminals¹. They have thus warned legislators against the old error of trusting uniformly to the deterrent efficacy of punishment; and, still more, have warned judges of the necessity of an "Individualisation of Punishment," based on such an inquiry into the career and characteristics of each offender as will make it possible to adapt his particular penalty to his particular needs². But their influence is now waning. The pathological peculiarities upon which so much stress has been laid by them are now shewn to occur in many persons who are free from all taint of criminality; and even should they occur in criminals more frequently than in others, this may be a mere result of economical surroundings, for the surroundings of most criminals are those of poverty. Nor is the innate instinct to crime at all so frequent as these writers assume; experience shews that most criminals are much-like other men, and that it is only by gradual steps that they have fallen. The fact that most criminals are born of non-criminal parents, considered in view of the success of the training given in institutions like Dr Barnardo's to children of the poorest classes, shews that it is less to Inheritance than to Environment that crime is due. The orderliness of the people of a colony may shew little inherited trace of the convict founders. And the fear of Punishment does go far in restraining ordinary people from crime. The Italian writers are—just as, on the other hand, were the eighteenth-century writers who laid exclusive stress

¹ Van Hamel well says: "Former lawyers had bidden men study Justice; Lombroso bade Justice study men."

² The importance of this Individualisation has been recognised ever since Wahlberg published his *Princip der Individualisirung in der Strafrechtspflege* (Vienna, 1869). Hence codes err that fix a minimum to punishments.

upon Deterrence—too eager to reduce the complex problem of crime to an artificial simplicity.

Lombrosian influence soon waned. The tide was turned against it by two elaborate books—Baer's *Der Verbrecher in anthropologischer Beziehung* and Aschaffenburg's *Das Verbrechen*. The waning has gone on¹. "There are now very few thorough-going adherents of Lombroso," said Lord Oxford in 1925. Dr Goring, in an invaluable treatise "The English Convict," tabulated elaborate medical statistics concerning three thousand grave offenders. The results challenge the Italian theories at almost every point; and lead to the inevitable conclusion that "there is no such thing as an anthropological criminal type" (p. 870). This conclusion is, of course, quite compatible with the familiar fact that the proportion of persons more or less defective, in body or mind, is usually higher amongst prisoners than amongst the general population. That fact is readily intelligible, quite apart from any theory of innate criminal propensities. For every one who has less than the average physical and mental powers for earning an honest living, has more than the average temptation to get his living dishonestly; and is hampered also in any effort to evade the police. Thus the proportion of feeble folk, of one sort or another, will always be higher amongst criminals than amongst ordinary people; and higher amongst criminals arrested and punished than amongst those who succeed in evading detection. The Prison Commissioners, in 1914, endorsed (p. 23) the conclusions of Goring's book; convinced that "there are no physical or mental or moral characteristics *peculiar* to the inmates of our prisons....The

¹ Prof. Dwight, the Harvard anatomist, wrote in 1911 that "The rise and fall of Lombroso's school is one of the most curious episodes in the history of science in the nineteenth century." Even in Italy there is a reaction under the "Humanist" school, led by Lanza, who base penal law upon the human Conscience. Prof. Karl Pearson holds that no one has more gravely "disregarded the laws of scientific procedure" than Lombroso.

man is not predestined to a criminal career by a tendency which he cannot control¹."

In the case of offenders whose minds are obviously feeble and who fall into crime from mere weakness of will, a seclusion² in farm-colonies under philanthropic surveillance might well be substituted for punitive imprisonment. The same feebleness which makes them yield to the first tempter, or to the first impulse, makes them also unable to feel any deterrent force in so apparently remote a prospect as that of legal punishment. Hence it is not by threats of a punitive seclusion, but only by the direct action of a preventive one, that they can be effectually withheld from committing crime.

Nor are these the only considerations which render necessary some extension of the variety of our modes of dealing with convicted offenders. Multifarious as were the forms of punishment practised by our ancestors, the humane abolition of many of them, the virtual restriction of capital punishment to cases of murder, and the reluctance to inflict corporal pain upon adult offenders³, have left us with practically no alternatives but those of penal Detention (in its various forms) and of pecuniary Fines. But a fine is not an adequate punishment for any offences that involve serious guilt⁴. Nor, again, is it a punishment always practically available, even in the case of the pettiest offences. For offenders are often penniless;

¹ Mr Clifford Rickards, in 1920, after acquaintance with several thousand convicts in penal servitude, "unhesitatingly confirms" Dr Goring's refutation of Lombroso (*A Prison Chaplain*, p. 66).

² As aimed at by the Mental Deficiency Act, 1913. Many degrees of mental disorder or weakness so lessen the power of self-control that the man, with his diminished responsibility, becomes "unfit for ordinary penal treatment, yet not capable of being certified as insane." About one per cent. of our prisoners seem to be thus "sub-normal."

³ Mutilation for the mere sake of Punishment survives only in Moslem countries. But, for another aim, a recent Californian statute (No. 224) allows the Court to inflict an emasculative operation on men guilty of sexual wrong to a girl under ten.

⁴ And even where a fine would intrinsically be an appropriate punishment, the legal maximum, at present set to it, often renders it inadequate. Thus the statutory 5s. has been joyfully found a slight set-off from the profits of keeping a shop open all Sunday.

a large portion of the total number of persons fined go to prison for default of payment¹. Yet, where a fine is an unsuitable or an impossible penalty, it is doubtful whether the only alternative—that of penal Detention—adequately effects the principal aims which the criminal law has in view. Detention may (1) gratify the prosecutor's Resentment, but it does not, as at present organised, afford him (2) any Compensation². It does, for the time being, effect (3) a Prevention of the continuance of the offender's criminal career; but in the case of short sentences (which "enable one criminal to do the work of many"), the suspension is brief, and (4) far too brief to secure his Reformation³. And as regards (5) its Deterrent effects, though both its irksomeness and its degradation are greatly dreaded by those on whom it has never been inflicted, yet so soon as persons have actually undergone imprisonment, the prospect of such incarceration (in spite of its involving the loss of alcohol and tobacco), ceases to have much influence upon their minds⁴. Thus prison-warders

¹ Justices should be careful to order them only a Second Division imprisonment (*supra*, p. 490 n. 6).

² See p. 520 n. 4.

³ Even a juvenile offender undergoes little amendment in less than three months (*Report of Prison Commissioners for 1901*, pp. 12, 44). But in longer periods the influence of the chaplain often has effect. Even an agnostic observer like Saleilles says of it, "Each one may think as he prefers about the Truth of religion; but its Reformatory value no criminologist can afford to neglect. For no more powerful instrument of Reformation can there be" (*Individualisation*, s. 97). Reformation, however, is less often effected in prison than by the aid now so constantly afforded upon discharge from prison. "You get a helping hand when you leave a prison, but not when you leave a workhouse," said a first offender. I once saw a young governess tried for attempting abortion. She desired to plead guilty but was dissuaded. Despite her full confession, fully corroborated, a "humane" jury found her not guilty. Never shall I forget her look of distress as she left the dock acquitted; but friendless, penniless, pregnant, ill. A conviction would have brought her both shelter and medical care in prison, and friendly guidance (see p. 532 *infra*) on her discharge.

⁴ "Women often go out of prison, saying they have never been so well or so happy anywhere else"; *Pr. Com. Report of 1901*, p. 332. See the same *Report*, pp. 44, 347, 388, 391, 445, as to the contrast between the casual wards of workhouses and the prison, with its better food, warmer rooms, separate room at night, cleaner bedding, gratuity on discharge, and its officers "who speak civil and don't shout at you"; cf. *supra*, p. 327. "Old offenders often

find the old offenders actually easier to manage than the first-convicted ones; for the routine has grown pleasant to them. Hence an experienced official (Major A. Griffiths) has even said that "one-half of the people in our prisons ought never to have been sent there, and the other half ought never to come out." The unfortunate fact that an actual experience of imprisonment does thus reduce its deterrent power over the offender (as well as impair his reputation and his self-respect), has led to a widespread exercise of the modern statutory powers¹ of releasing first offenders without punishment. Hence comes the paradoxical result, that persons, who would have been punished had they committed some unlawful act so petty as to admit of a fine, often enjoy immunity when they commit a graver offence.

Even if we hesitate to say, with Professor Vinogradoff², that Imprisonment is "the most unsatisfactory" of all modes of punishment, we cannot but recognise the desirability of

commit crime to get into prison, to recruit their energies for fresh depredations"; Dr John Campbell's *Thirty Years' Prison Experiences*, p. 124. Deterrence thus is weakest where most needed. And the proposals, now current, to "brighten" prison-life by concerts, theatricals, and dances, would render it still less deterrent. When Mme. Sarah Bernhardt and her company visited California in 1913, they were engaged to act in the prison at St Quentin, though their language was French; on the declared ground that "every prisoner ought to be given a chance." Of what?

Even in India the death-rate of prisoners is under two-thirds of that of the general population. And English prisons are ranked as "among the best sanatoria in our island." In Howard's day it was otherwise. English prisons were then nests of typhus ("gaol-fever") by which, as 19 Car. 2, c. 4, s. 2 states, "sometimes the judges, justices, and jurors have been infected; and many of them died thereof." Thus successive "Black Assizes" were fatal even to judges: at Oxford in 1577 to Bell, C.B. (and, it is said, to all the 300 persons in the court); at Exeter in 1586 to Flowerdew, B.; at Taunton in 1730 to Pengelly, L.C.B.; at the Old Bailey in 1750 to Abney, J., Clarke, B., and the Lord-Mayor. These last fatalities are still to-day commemorated at the Central Criminal Court by the sweet herbs which, from May until autumn, are scattered as disinfectants upon the several judicial benches.

¹ *Supra*, p. 510. Cf. a study by Dr Kaarlo Ignatius, in *Zeitschrift für die gesamte Strafrechtswissenschaft* for 1901. In 1923, there were 17,923 persons thus released, after being proved guilty of indictable offences. The persons so released form over one-third of those found guilty of indictable crime.

² *Historical Jurisprudence*, p. 57.

introducing new modes. Bentham¹ has shewn the efficacy of penalties of mere Ignominy—forfeitures not of liberty or money but of Reputation—which submit the offender to the ridicule or censure of public opinion. His remarks find illustrations in Gierke's interesting historical pamphlet, *Der Humor im deutschen Recht*. The "Drunkard's cloak" of Commonwealth times, and the Stocks (obsolete since about 1870² but never abolished) are kindred English instances. In Russia the Soviet Criminal Code has a punishment of Public Censure; *i.e.* the publishing of the conviction and the advertising of it at the offender's cost in newspapers. It permits also a condemnation to Compulsory Labour for prolonged hours, but at the offender's own home without any loss of liberty.

In France a desire is already apparent for a wider extension of corporal punishment. In England that close reasoner, Mr W. S. Lilly (*Idola Fori*, p. 241), has expressed a similar view. And in his *Studies by the Way* (p. 59) the late Lord Justice Fry, from long experience as a county magistrate, wrote that "For the purpose [even] of Reformation, short and intense punishments are often better than long punishments—a sharp flogging than a long confinement. I often wish that the criminal law of this country gave more power of inflicting punishments of this description." The Court of Criminal Appeal said (April 15, 1919), "There can be no doubt that with certain types of people there can be no such deterrent as that of flogging."

In India, in 1862, flogging ceased to be inflicted; but the results led to its early revival at the unanimous demand of the local Governments. Sir Henry Maine, in introducing the Bill, pronounced flogging (*Speeches* p. 122), "though it should be sparingly employed and carefully guarded," to be "the most strongly deterrent of known punishments." Cf. Judge Rentoul's *Stray Thoughts*, p. 182; Mercier's *Crime*

¹ *Penal Law*, II. ch. xv.

² I saw a man in them at Halifax about 1854.

and *Criminals*, p. 282; Rickards' *Prison Chaplain*, p. 202; Lombroso's *Crime*, § 212. The power (p. 439 *supra*) of petty sessions to whip boys summarily convicted of *indictable* offences might profitably be extended to malicious non-indictable ones. Fines punish the parents; not the boy.

The actual effects of our penal system during the past decade deserve review. Despite high prices and widespread excitement, a remarkable diminution in serious crime took place after the outbreak of war in 1914. The offenders tried by jury in 1913 numbered 12,511; but those in 1918 only 5904. Those tried at Petty Sessions in 1913 numbered 731,048; but those in 1918 only 427,572. On the other hand, the number of *juvenile* offenders increased markedly. In 1913, the boys and girls sent to Reformatories numbered only 1250; but in 1918 they were 1685, and would have been more numerous had accommodation been available. At Middlesex Sessions in the year 1917-18 there were more prisoners of the five ages sixteen to twenty, than of all the fifty and more ages that exceed twenty. This increase seemed due mainly to domestic control being relaxed by the absence of so many fathers—and so many school-teachers and Scoutmasters—at the war. Moreover, the readiness with which employment could be obtained, whilst it kept many adults from crime, had often the opposite effect upon boys and girls; who thus obtained high wages and a freedom from domestic life and control. In August 1920, the Education Office ascertained that of young thieves sixty-eight per cent. had no excuse on the ground of poverty.

But amongst adults the lessening of crime was due in part to this same facility of obtaining employment; in part, too, to the absence, in the army, of many persons of weak or of turbulent natures. Moreover, the energy which prisoners exhibited when employed on any work intended for the army suggests that, even amongst the criminal classes, the war aroused a patriotic public spirit which tended to restrain

them from evil. This energy in army-work was shown in the excellence of both its quantity and its quality. It was partly because many prisoners had friends at the front; but partly also because "the crisis made a higher conception of Duty take hold of people's minds" (Lush, J.). A fourth cause lay in the restrictions placed on the sale of alcoholic liquors. The subsequent partial relaxation of those restrictions was rapidly followed by marked effects; the convictions for drunkenness, which in 1913 were 204,038, had fallen by 1918 to 29,075; but in 1920 were 91,812. (By 1923 they had fallen back to 74,751.) Increase of drunkenness is always accompanied by an increase of crime.

To the diminution produced by the War in serious offences, one singular exception must be noted. Military life, by removing men far from their homes, weakened matrimonial ties; and thus greatly multiplied bigamies. During the five years ending in March 1914, the average annual number of imprisonments for that crime was only 79; but in the year ending in March 1919 it had risen to 663. At the Central Criminal Court, before the war, bigamies averaged less than five per cent. of the cases tried; but in 1919 this five became twenty-two per cent. In 1924 and 1925 it fell below ten per cent. The cause which multiplied bigamies must have had some share also in another change. "Since the war, Abortion has increased: and the consciences of a great many people have become deadened as to its guilt" (Darling, J., at C. C. C., January 23, 1920). Many, it may be added, of the divorce cases tried since the war arose out of the unfaithfulness of wives during their husbands' absence on military duty.

That serious offences, in general, would again become more frequent after the war, was inevitable. Tramps who had passed into the army during hostilities, resumed, upon demobilisation, their habits of vagrancy; many habitual criminals similarly relapsed. And the young offenders whom the circumstances of the war led into evil courses, often

continued to pursue them, or even fell into more heinous guilt. Moreover, some men of previously excellent character returned home seriously unsettled; the excitements of combatant life having bred in them a spirit of recklessness. Again many non-military men who were employed at home, in trade or on railways or in docks, during the war, became used to a rate of wages so high that on its fall, in peace-time, they preferred pilfering to economising; though many of them were still earning substantial wages when detected. Indeed the chaplain of Brixton Prison—confirming my remarks on p. 518 *supra*—says even of criminals in general that usually they “do not come to prison because they have not enough money but because they have too much”; the money has led them to gamble or to drink (*Prison Com. Report* for 1919–20).

The latest statistics (those of 1927, published in 1929) are discouraging. The oft quoted diminution in the number of persons in prison, and of prisons themselves, must be discounted; being largely due to the recent wise reluctance to imprison first offenders and to the remarkable reduction¹ in the length of sentences of imprisonment. It is clear that, whilst in 1913 only 63,269 persons were tried for indictable offences, yet in 1926 the number had risen to 79,591. And the number of such offences known by the police to have been committed had risen from 97,983 to 133,460². True, the general strike and the coal-stoppage made 1926 an abnormal period. But 1927 proved to have “the highest crime-rate of any year (except 1926) in the last twenty.” The means of repressing crime are lessened; so many new duties purely civil having been thrown on the police, *e.g.* as to road-traffic and cattle diseases. But it is satisfactory to know that the most alarming class of offences—those of violence to the person—are steadily falling; and were in 1927 only about half of what they averaged in 1900–04. It is at

¹ Lord Sterndale has reckoned it to be a reduction to *one-fifth* of the average sentences of half a century ago. Cf. p. 547 *infra*.

² Which, however, is only the same proportion to population as in 1908–12.

any rate clear that our present humane administration of criminal justice is sufficiently effective to afford us no cause to regret the abandonment of the severities of a century ago¹. That in 1929, amidst widespread distress, with fourteen hundred thousand persons out of work, there should be no alarming increase of crime, and no strained relations between the police and the populace, is a fact noteworthy and encouraging.

Four grave social problems embarrass us; those of the delinquent, the degraded, the defective, and the dependent classes. But the gravest of the four is the problem of delinquency.

¹ Those theoretical severities are, however, often quoted by popular writers without any recognition of the great extent to which they were limited in actual practice. Thus in 1810 (*Ann. Reg.* p. 410), out of 145 persons sentenced to death for aggravated thefts, only two were executed. In 1820 there were 352 sentences of death for forgery of bank-notes, but only 21 were carried out; and a general total of 1236 sentences of death, of which only 107 were carried out. In 1810, out of 476 only 66 were. In the five years 1814-18 there were 4557 capital sentences passed; but only 434 were carried out. See *Parl. Papers* of 1819, xvii. 299. During the seventy years 1749-1819 in London and Middlesex executions took place for only twenty-five species of capital felonies, though nearly two hundred then existed. Cf. *Spencer Walpole's Hist. Eng.* iv. 73.

Individual cases of severity are often quoted in a like one-sided manner. Much has been written about "Kelly, who was hanged in 1785 for stealing sixpence farthing." But that sum was the little all of a poor sailor, to whose throat Kelly and another highwayman set their knives and robbed him.

CHAPTER XXXIV

COMING CHANGES

THE student's task in mastering the principles of English criminal law and procedure—a task which it is hoped that the present volume may in some slight degree facilitate—will be rendered far more easy should those principles ever be reduced by the legislature to an authoritative form. But the codification of criminal law—though successfully accomplished in all the leading continental countries, in India, and in several of the principal British colonies—seems in England to be more remote than some fifty years ago, when it formed in successive sessions a prominent feature in the programme of Lord Beaconsfield's cabinet. They, in 1878, introduced a Criminal Code Bill, which had been drafted by Sir James Fitzjames Stephen; and reintroduced it in 1879, after it had been recast by a committee of judges, and again in 1880, with some few further alterations. Had the Bill passed, it would not only have reduced the present law to a briefer and more precise shape, but would also have introduced some important reforms. For it would have (1) recast the present distinctions between felony and misdemeanor, (2) recast the present law as to coercion and compulsion, (3) removed from the law of murder all cases of merely "constructive" malice, and (4) simplified the multiform law as to thefts and frauds. And it would, further, have effected several changes in procedure; as, for instance, with regard to indictments, venues, special juries, challenges, costs, and appeals. But the Bill still awaits enactment¹.

Meanwhile some particular reforms are being effected piece-

¹ "It is impossible to view without humiliation the entire cessation of any effort to improve the form of English law, and the apathy with which that cessation has been regarded;...our want [of a criminal code] produces practical and substantial inconveniences" (Sir Courtenay Ilbert, *Legislative Methods* 1901, p. 162).

meal. Thus the Act of 1907 created a general Court of Criminal Appeal. And in 1911 the Perjury Act, in 1913 the Forgery Act, and in 1916 the Larceny Act, gave instalments of codification.

And, turning from legislation to current practice; we may note the much greater care now taken in the Individualisation of sentences—fitting the punishment not only to the crime, but also to the particular criminal¹. New plans, again, are being tried in penal administration; in the hope of promoting the Reformation of offenders and so checking Recidivism, (cf. p. 507, *supra*). Thus in our prisons educational classes are being multiplied, largely by voluntary help; and voluntary visitors also are being brought into touch with prisoners. This spontaneous philanthropy is in striking contrast with the recent French experience described on p. 511 n. *supra*. A visible sign of the present attitude towards those incarcerated is the disappearance of the traditional broad arrow from their clothing; (a contrast to the days when, as at Wakefield in 1817, one in six of those prisoners who attended the chapel attended it in chains). Again, upon release from gaol, assistance in the critical first days of liberty is offered by the Discharged Prisoners' Aid Societies; and is accepted by nearly half of those liberated. To that temporary help these Societies—whose expenditure is about £27,000 a year—add efforts to secure employment for the ex-prisoner; and they are now attempting to secure friendly supervision of his after-career. A kindred motive has introduced the employment of women-police; rather for their ethical and preventive influence than for coercive activities. At the end of 1925 there were 131 women so employed south of the Tweed; 46 of them being in London.

Amongst possible changes which have come under public

¹ Some of us who knew London Sessions will remember how earnestly the late Mr McConnell, before determining a sentence, would say to the prisoner, "Tell me something about yourself. Especially tell me *anything good* about yourself." And the invitation was seldom fruitless.

discussion are—the adoption, by agreement of the judges, of some approximate standard of sentences for familiar types of crime (and the Court of Criminal Appeal is tending to create one); the abolition of grand juries¹; the enlargement of the public provision for the prosecution of offenders²; the provision, as in France³, of counsel for the defence of all indicted prisoners; and a more systematic allowance of compensation from public funds to convicted prisoners who establish their innocence⁴, or even (as in Scandinavia) to acquitted prisoners who have undergone actual detention in gaol whilst awaiting trial—a detention which takes place under rules more severe than those sometimes applied now to convicted prisoners. Some reformers advocate the introduction of the American permission of Indeterminate sentences. In these, the judge fixes only a minimum and (in some cases) a maximum; and the executive authority can release the prisoner at any intermediate time when it considers him sufficiently reclaimed. “Six months to five years” is a frequent American sentence.

¹ *Supra*, p. 462. Mittermaier, *Englische Strafverfahren*, s. 15.

² Usually the Director of Public Prosecutions undertakes less than eight hundred cases in a year; in 1927, 643. On the success in Scotland of its universal system of public prosecutions, see the *Edinburgh Review*, LXXXIII. 202; cf. p. 10 *supra*. But it is too often forgotten that, even in England, every Chief Constable of a borough or a county, and the Superintendent of Police in every petty-sessional division of a county, is practically an active local Public Prosecutor. See p. 548 *infra*.

³ The *Code d'Instruction Criminelle*, art. 294, compels French assize-courts to assign counsel to every undefended prisoner. For England, see the Poor Prisoners' Defence Act, 1903 (3 Edw. VII. c. 38); *supra*, p. 459.

⁴ Cf. Ferri's *Sociologie criminelle*, pp. 502–4. Some such compensation is now recognised by law in Portugal, Scandinavia, Austria, Belgium, France, Germany, and Switzerland. In England in 1848 Mr Barber, a solicitor, received £5000 after a transportation for supposed forgery. In 1901, our Treasury granted £600 to Mr Lillywhite, who had been brought in custody from New Zealand on a charge of murder. In 1905, it awarded £5000 to Mr Adolf Beck, after actual conviction; on demonstration that fifteen witnesses had been mistaken in identifying him. This was only the eighth case of compensation during seventy years. In 1921, a grant of £250 was made to Mrs Gooding, who had twice been wrongfully imprisoned for libel on prosecutions by the actual libeller! In 1928 (*The Times*, Aug. 9) Oscar Slater received £6000 when his conviction was quashed; (though quashed not on the merits but only for the judge's error of law).

But the persistent increase of crime in the United States does not prepossess us in favour of Transatlantic penal methods. An indeterminate sentence misses the opportunity of educating the community by a definite measure of judicial condemnation; and it relegates the prisoner to the judgments of a secret officialism, thereby tempting him to hypocrisy. Yet even the most acute executive officials cannot infer much, as to what will be a convict's behaviour after release, from merely watching his behaviour in confinement. For habitual offenders are, when in prison, as a Home Secretary found (*Hansard*, May 27, 1908), "generally speaking, excellently behaved, orthodox worshippers in chapel, and in many cases regular communicants." So out of 377 persons, selected by experts as suitable for release from Preventive Detention, nearly two-thirds proved unfit for it, and were reconfined or even reconvicted¹. One, released on his word of honour to reform, committed four crimes within forty-eight hours from his liberation.

But all these proposed changes in our penal system are of so limited a character as to shew that the main structure is accepted on all hands as sound. The broad rules of English criminal law and procedure—in spite of a few imperfections in their substance and many imperfections in their form—embody such extensive experience, and are animated by so strong a spirit of fairness and humanity, that our criminal courts, great and small alike, may well recall the tribunal depicted by a great writer², "où, dans l'obscurité, la laideur, et la tristesse, se dégageait une impression austère et auguste. Car on y sentait cette grande chose humaine qu'on appelle La Loi; et cette grande chose divine qu'on appelle La Justice."

¹ Cf. p. 509 *supra*.

² Victor Hugo, *Les Misérables*, vii. ch. 9.

SUPPLEMENT OF NOTES

SUPPLEMENT

REPORTS OF JUDICIAL PROCEEDINGS.

(note to p. 10)

By the Judicial Proceedings (Regulation of Reports) Act, 1926 (16 and 17 Geo. 5, c. 61), it is made an offence, punishable on summary conviction, for any "proprietor, editor, master-printer, or publisher" to print or publish any demoralizingly indecent details of any judicial proceedings; or *any* details of any matrimonial judicial proceedings (except certain specified particulars, *e.g.* the names of the parties and the witnesses, the summing-up, the verdict, and the judgment). The offender may be sentenced to imprisonment for not more than four months, or to a fine not exceeding £500, or to both.

Still (s. 3) no prosecution is to be commenced without the sanction of the Attorney-General.

KNOCK-OUTS.

(note to pp. 10 and 292)

But in the case of an habitual "dealer," it is now made a statutory offence, punishable summarily, (1) for him to give or offer any gift or consideration to any other person for abstaining from bidding at an auction, whether generally or only for a particular lot; and similarly (2) for the other person to accept such a gift or consideration. A fine up to £100 or imprisonment not exceeding six months, or both of these, may be inflicted. But there can be no prosecution without the consent of the Attorney-General or Solicitor-General. See 17 and 18 Geo. 5, c. 12.

PUNISHMENT DETERRENT.

(note to p. 31)

For instances of the efficiency of punishment in the training of animals and fishes, see Washburn's *The Animal Mind*, p. 248; E. M. Smith's *Mind in Animals*, p. 50; and R. M. Yates' *The Dancing Mouse*. Mr Yates says that "situations which are potentially disagreeable repel an animal with a constancy which is remarkable."

THE MENTAL DEFICIENCY ACTS.

(note to p. 58)

These make provision for the care and control of persons who, though not insane, have—before reaching the age of *eighteen*—shewn that, whether from inherent causes or from disease or injury, they have never acquired full powers of mind.

By the Mental Deficiency Act, 1927, s. 1 (i), the four classes of them are defined as follows:

a. *Idiots*; those unable to guard themselves against common physical dangers.

b. *Imbeciles*; those incapable of managing themselves or their affairs, (or, in the case of children, of being taught to do so).

c. *Feeble-minded*; those who require care, supervision and control, for their own protection or for the protection of others, (or, in the case of children, who appear permanently incapable of benefiting from ordinary school-instruction).

d. *Moral Imbeciles*; those in whose case mental defectiveness is coupled with strongly vicious or criminal propensities, and who require care, supervision and control, for the protection of others.

Our tests of our neighbours' sanity are sometimes peculiar. I remember a witness (Oct. 4, 1903) stating, as evidence of

a defendant's insanity, that "He is eccentric. I have worked with him for thirteen years; and he is never late but always there at his time."

TOO INSANE FOR EXECUTION.

(note to p. 60)

Thus, in a case which aroused "a public outcry" in 1922, (*Annual Register*, p. 9), Ronald True was convicted of murder; the jury declaring him, in spite of his peculiarities, to be not insane within the McNaughton rules. He was accordingly sentenced to death. But a committee of medical experts, whom the Home Secretary consulted, pronounced him not sane enough to be able to shew cause why he should not be executed. The execution accordingly was indefinitely postponed; and, I believe, still remains so.

INTOXICATION AS A DEFENCE.

(note to p. 62)

We have seen that drunkenness—even though it lead a man to do what he would not have done had he been sober—is not *in itself* any excuse for his crime. Consequently although he were so drunk that he could not form an intention—and therefore must be acquitted of murder, or of wounding with intent to do grievous bodily harm—he nevertheless may be guilty enough to be convicted of a manslaughter, or of an unlawful wounding.

SUSPENDED PENSIONS.

(note to p. 97)

Beyond this (theoretically absolute) forfeiture of the pensions of those convicted felons who are under a *severe* sentence of imprisonment, a more general though less drastic penalty has been established by the Ministry of Pensions. I am indebted to a high authority for the information that, under

the Instructions issued by that Ministry, *every* convicted offender, whether felon or misdemeanant, whose sentence is one of imprisonment at all (however brief and whether with or without hard labour), finds any pension which comes to him from that Department *suspended* until the end of his imprisonment. But after his release, the future instalments will be paid to him. In practice they also are thus paid even when the pension has been absolutely forfeited under the Act of 1870. "Moreover in the case of pensions paid by other Departments to former members of the Army or Navy or Air Force, there is usually a power to restore any pension forfeited under that Act; and this power is not dependent upon the nature or length of the imprisonment."

LARCENY BY A TRICK.

(note to p. 206)

This offence, often so difficult to distinguish from False Pretences, is usually the student's chief perplexity in criminal law. It cannot be better defined than in the words of Lord Sumner:

"'Larceny by trick' is a short way of saying that the actual delivery *de manu in manum*, though it wore the outward appearance of Consent on the deliverer's part, was in that respect illusory. Because—owing to the deception practised on him—his mind did not go consensually with his physical action"; (*Lake v. Simmons*, L.R. [1927] A.C. at p. 503).

There thus is no more a Consent or a Contract than when a pocket is picked. But in False Pretences there is a Consent; and therefore a Contract, though only a voidable one. Cf. p. 242 *supra*.

CLANDESTINE BORROWINGS.

(note to p. 211)

Scotland similarly does punish the clandestinely taking possession of a motor-car and proceeding to use it with knowledge that the owner would not permit the act. If it were

held to be no offence, "in these days when one is familiar with the circumstances in which motor-cars are openly parked in the public street, the result"—said a Scottish Court—"would be not only lamentable but absurd." (*Justiciary Reports* [1926] 100.)

ASHWELL'S CASE.

(note to p. 216)

The affirmation of the conviction, though due only to an equal division of judicial opinions, seems nevertheless to settle the law authoritatively. Cf. 8 H.L.C. at p. 392.

Yet the opposite view—that the legal "taking" was the (admittedly innocent) actual physical taking, and that the conviction ought therefore to have been quashed—has been approved not only by Lord Loreburn but also by Lord Birkenhead. The latter writer says (*Fourteen English Judges*, p. 321), "Stephen's reasoning, that it was *not* Larceny, seems conclusive. But apparently we must accept the decision as one that the 'taking' did not occur until Ashwell realized the mistake."

CONCEALMENT OF INCUMBRANCES.

(note to p. 246)

By the Law of Property Amendment Act, 1925 (15 Geo. V., c. 20, s. 183 (i)), it is made a misdemeanor, punishable with fine and two years' imprisonment, for a vendor of either real or personal property (including choses in action) to conceal from the purchaser—or intending purchaser (s. 205, xxi)—thereof, any instrument or incumbrance material to the title, or to falsify any pedigree affecting the title; *with intent to defraud*.

HANDICAP RACES.

(note to p. 252)

The decision in *Reg. v. Button* was followed, and carried further, in an Australian case, *Rex v. Lambassi*. (Victorian Law Reports 1927, p. 349.)

Lambassi gave a false name and false particulars of his alleged performances; and thereby secured *the opportunity of competing* in a handicap foot-race. He was handicapped. But there was no evidence that the handicap actually obtained by his falsehoods was more favourable than would otherwise have been given to him; and he swore that those falsehoods were not such as would be likely to obtain him one. He ran and won; and received the prize-money. He was convicted; and the Supreme Court affirmed the conviction.

“FALSITY” IN FORGERIES.

(note to p. 259)

A singular illustration of the nature of that Falsity which is indispensable to a forgery is afforded by the case of *Britian v. Bank of London*; (11 W. R. 569, and *The Times* of April 21, 1863). It was said by *The Times* to have decided “one of the most curious and knotty points of criminal law that ever arose.” The action was for a false imprisonment.

A cheque given by Browne to Britian was cashed by the Bank of London; who ultimately, in their usual course, cancelled it and returned it to Browne. He, without changing any letter in it, “touched up” the signature so as to make it less like his own ordinary writing; and then took it back to the Bank, alleging that Britian had forged it. The Bank, believing this, repaid him; and gave Britian into custody, but ultimately abandoned the prosecution. Britian brought this action for false imprisonment. A verdict in his favour was sustained, on appeal, by a court of four judges. They held the arrest unjustifiable (see p. 449 *supra*); as no felony had been committed. For Browne’s tampering with the cheque did not amount to a forgery; since it gave no new operation to the cheque but left its legal effect unaltered. Browne was guilty only of a fraudulent misdemeanor.

PRESUMPTION OF REGULARITY.

(note to p. 332)

“A foot-passenger is justified in assuming that a car coming towards him will be driven moderately and prudently. He

may cross the road on that assumption; and is not disentitled to recover damages because—acting on that assumption—he has crossed the road without looking, and has sustained injury through the car being driven at an excessive pace.” Nevertheless “while vehicles are bound to go at a steady pace and not to be driven furiously, foot-passengers crossing the carriage-way are bound to look after their own safety and not to run obvious and unnecessary risk.” (Beven on Negligence, pp. 688 and 693.)

So, again, if a Will, which is proved to have been kept by the testator in his own custody, be not forthcoming at his death, there is a *primâ facie* presumption that it was destroyed by himself; and also a presumption that it was destroyed with the intention of revoking it. And, as was said in *Colvin v. Fraser* (2 Hagg. at p. 235), “these presumptions may be resolved...into the reasonable probability of fact, deduced from the ordinary practice of mankind and from sound reason. Persons in general, keep their Wills in places of safety.” It cannot be presumed that someone else destroyed it without the testator’s authority. For that would be to presume a crime.

CIRCUMSTANTIAL EVIDENCE.

(note to p. 337)

The value of Absence of Motive as circumstantial evidence of innocence is habitually exaggerated by those who defend prisoners. “Do not judge by Motives,” said Lord Brampton, “for they depend upon the character of the individual.” Because, as was said by Darling, J., “a motive which ordinary men would think inadequate may be perfectly sufficient to a person of criminal mind.” Many great crimes have been proved quite beyond doubt, although their motives were never ascertained.

FINGERPRINTS.

(note to p. 339)

It is usual to take the fingerprints of any offender who is sentenced to a month or more of imprisonment. Scotland

Yard already (1929) possesses prints from over half a million persons; to which it adds about 36,000 annually. The number of persons identified by fingerprints averages fifteen thousand in each year. They are so minutely classified that it is sometimes possible to find the needed one in less than a minute.

UNSWORN CHILDREN.

(note to p. 393)

Moreover a child who thus gives evidence without being sworn is not adequately corroborated by the *unsworn* evidence given by other similar children. See *Rex v. Coyle* (N. of I. [1925] 208). Nor is any complaint, which this child has made, an adequate corroboration. For a complaint is (see p. 373 *supra*) proof merely of the complainant's consistency of conduct; and not evidence at all of the facts alleged in it.

WITNESSES TO CHARACTER.

(note to p. 397)

The student should notice that it is only to *defendants* that our criminal courts concede the anomalous privilege of calling such witnesses.

Earl Russell prosecuted a group of libellers who had accused him of a felony; and they pleaded as a defence the truth of their charges against him; (cf. p. 315 *supra*). It was held that, though thus accused of crime, he could not support his denial of the accusation by calling evidence of his good character. "If Lord Russell," said Hawkins, J., "had wished to call a host of witnesses to prove that his general character was unimpeachable, I should not have allowed him; for it would not have been evidence" (*The Times*, June 8th, 1897). Cf. *Cornwall v. Richardson*, Ry. and M. 305.

PRISONER'S OWN EVIDENCE

(note to p. 407)

Sir Herbert Stephen, from his long and wide experience as Clerk of Assize, wrote in 1926, "As a general rule, a prisoner who is *not* called as a witness can have little hope of an acquittal."

A fellow-prisoner tried along with him is not debarred, as the prosecutor is, from commenting on his not having gone into the box.

EVIDENCE BEFORE CORONERS.

(note to p. 431)

The strict rules as to judicial evidence are habitually relaxed at Coroners' Inquests. For their proceedings are investigations rather than trials. The coroner "is bound to collect, as far as he can, all information and knowledge from neighbours and others who can throw any light upon the cause of death"; (Wills, J.). So hearsay evidence is freely taken. But the jury, before finding a verdict that accuses any person of *crime*, should disregard everything except strictly legal evidence. See Jervis on Coroners, pp. 15, 255.

ADOPTION.

(note to p. 436)

By the Adoption of Children Act, 1926 (16 and 17 Geo. 5, c. 29), a remarkable innovation was introduced into our legal system. Under this statute not only the High Court and any County Court, but even any court of summary jurisdiction, can make an order transferring to an Adopter the rights and duties of the natural parents or guardians of the person adopted. But this latter person must (1) be under twenty-one years of age, and (2) have never been married, and (3) either be twenty-one years younger than the Adopter, or else be so near of kin that the two cannot lawfully marry each other. And the Adopter must be over twenty-five years of age.

COUNTERMANDING A GRAND JURY.

(note to p. 462)

Consequently it is provided by the Criminal Justice Act, 1925, s. 19, that if, up to the fifth day before holding any Quarter Sessions, no person has been committed for trial

there who has not thus admitted his guilt to the examining justice, the attendance of a grand jury shall not be required. And accordingly any indictments "may be presented to the court without having been found by a grand jury."

But no such provision is made for similar circumstances at Assizes.

PRISONER'S COUNSEL.

(note to p. 482)

An illustration of the limits which honour imposes upon an advocate, even when *defending* an accused person, was afforded by the Irish Court of Criminal Appeal in *Att. Gen. v. O'Leary* (Ir. Rep. [1926] at p. 451). They held it to be correct to say that such a defender, if he do not produce the prisoner to give evidence, must not suggest to the jury that another person, not under trial, committed the crime. But, if he can indicate to the jury any portion of the *evidence* which shews that another person may have committed it, he is entitled to point this out.

The reader may be reminded of what has been already said at p. 339, n. 4 *supra*.

PENAL SERVITUDE.

(note to p. 489)

By the Penal Servitude Act, 1926 (16 and 17 Geo. 5, c. 58), when a person is convicted of two or more indictable offences which are not punishable by penal servitude and for which the *aggregate* sentences might amount to three or more years' imprisonment, the court which convicts him may, instead of inflicting imprisonment, sentence him to penal servitude for a term not exceeding seven years, and not exceeding the term of the aggregate possible sentences. But—see *Rex v. Ascoli* (20 Cr. App. R. 156)—only if it consider that even the maximum sentences applicable under the ordinary law would be inadequate for this multiplicity of offences.

ATTRACTIVE PRISONS.

(note to p. 512)

Professor Ferri, the great Italian criminalist, wisely says that "The State should never lose the sense of Proportion in its respective attitudes to those who do commit offences, and to those who continue innocent despite both poverty and opportunities for crime. It is not prudent to make artisans and labourers realise that inside prison their material advantages—and in England their intellectual advantages also—are no less, and sometimes are even greater, than those which they obtained when in their freedom outside prison." Cf. pp. 524-5 *supra*.

FACTS MITIGATING PUNISHMENT.

(note to p. 515)

That the offender ultimately gave useful information to the Crown, will tell in his favour: 9 Cr. App. R. 142.

Youth is now treated habitually as a circumstance that should reduce the penalty; even at so ripe an age as twenty-three or four. Cf. 20 Cr. App. R. 102, 118, 138, 182.

Probably the most illogical plea ever urged in mitigation was that suggested by a jury at the Central Criminal Court in November 1923, in the case of *Rex v. Mavor*. The jury accompanied their verdict of Guilty with a recommendation to mercy. When asked why, the foreman replied "*From the lack of evidence.*" Mr Justice Swift easily induced them to withdraw that recommendation.

LENIENT SENTENCES.

(note to p. 529)

Not very long ago it was the habitual practice to inflict five years' penal servitude upon postmen who stole any letters entrusted to them. But, as Lord Hewart, L.C.J., said (in *Rex v. Woodcock*, Nov. 26, 1928): "In recent years greater

leniency has been shown. And with results that are by no means satisfactory." He accordingly passed a short sentence of penal servitude, though it was the postman's first conviction. And the Recorder of London also noted (*Rex v. Taylor*, Feb. 1st, 1929) that "offences by postmen are becoming more and more prevalent."

PROSECUTIONS.

(note to p. 533)

An offender may be prosecuted either

(I) Officially:

(a) by the local police, or

(b) by the Director of Public Prosecutions, if the offence be very heinous or otherwise important.

(II) By a private prosecutor. (Contrast Scotch procedure, *supra*, p. 10, n. 2.)

Before the institution of our modern police system (see p. 446 *supra*) pressure was habitually put upon the victim of a crime to make him undertake the trouble and expense of prosecuting. As Edward Gibbon Wakefield complained in 1831, the criminal law benefited the whole community, just as a bridge does; yet the tolls for using it were levied upon those unlucky travellers whom it had failed to carry safely. Cf. p. 494 *supra*. But now, as the authorities are ready to take proceedings at the public expense for any offence that really calls for it, even the persons injured by the crime are usually reluctant to incur the trouble and cost of a prosecution; despite the pecuniary contribution they would receive from the county rate.

Sometimes, however, the man wronged feels anxious that the prosecution should be conducted with full skill; and he therefore lays the information himself. In such a case it is "not only permissible but desirable" that he should thus exercise the general right (see p. 10, n. *supra*) of prosecuting. Hence the committing justices ought not to forestall him by

binding over an unconcerned constable; see *Rex v. Ely Justices* (45 T. L. R. 93). The likelihood of a guilty offender's being merely placed under Probation, and so escaping all actual punishment, tends now to make private prosecutions rarer.

The extraordinary two prosecutions of Mrs Gooding (*supra*, p. 533 n. and *The Times*, Aug. 11, 1921) were private ones.

THE LATEST STATISTICS

"Through variety of times and things in this unconstant world"—as Hooker phrases it—the statistics of our criminal courts alter much from year to year. The last bluebook of them, published in April 1929, gives the facts of 1927.

In that year the number of *indictable* offences that became known to the police was 125,703; (which was about eight per cent. above the average of the years 1922–26). Prosecutions for these were commenced against 65,163 persons. Of them a few were ultimately not sent for trial; but 7136 were tried at Assizes (3077) or Quarter Sessions (4059). Thus the great bulk—say about seven-eighths—were tried summarily.

For *non-indictable* offences the annual number of persons tried has fluctuated much during our twentieth century; at first decreasing, from over seven to under six hundred thousand in 1921; but subsequently rising again. In 1927 they were 617,823. Fluctuations still greater have occurred in the relative proportions of different classes of these petty offences. Thus prosecutions on charges connected with Motor-vehicles numbered in 1904 only 3879; but had risen in 1927 to 183,448 (thirty per cent. of the prosecutions for petty offences). On the other hand, charges connected with Drunkenness were in 1913 so many as 204,038; but in 1927 they had fallen to 70,869. This decrease is officially attributed to the higher price and lower strength of intoxicating liquors, restricted hours of sale, lack of money, and (cf. p. 528) to a welcome change in public opinion. The Scotch statistics shew a similar

result; some 50,000 drunken defendants in 1914, but only 20,000 in 1927.

The practice of inflicting short imprisonments—which familiarize the man with prison-life and thereby weaken its deterrent effect, yet are not long enough to exercise on him any reformative influence—is happily on the decline. In 1909 imprisonment for only a fortnight or less was inflicted upon 109,015 offenders; but in 1927 only upon 14,576.

The value of the Discharged Prisoners Aid Societies is shewn by the fact that in 1926 fifty-eight per cent. of the men discharged, and twenty-five per cent. of the women, were aided by them. In the same year the London police magistrates shewed their high estimate of the similar philanthropic work done by the Police Court Missionaries, by entrusting to their care no fewer than 15,375 persons. Of these there were 2482 who were placed under supervision, Missionaries being appointed as their probation officers.

In 1926 the average earnings of a prisoner (cf. p. 520 *supra*) were under £36 for the year. In Scotland the average in 1925 was similar—£37. The men are weak and indolent.

Only one prisoner in twenty can read and write *well*. Cf. p. 517 *supra*.

Of the 23 women charged in 1927 with having killed their newly-born children, fourteen were charged only with Infanticide, under the Act of 1922.

About 33,000 guilty persons were released on Probation; not quite half of them being also put under the supervision of a Probation Officer.

On December 31, 1927, 160 persons were undergoing Preventive Detention; and 42 persons were in that year sentenced to it prospectively. Five years is the most usual period. Cf. p. 508 *supra*.

Coroners' inquests in 1927 found verdicts of Suicide in 4863 cases; but adjudged the deceased to be *felo de se* in only 98 of them; less than 2 per cent. (See above, p. 113.)

APPENDIX

FORMS OF INDICTMENTS

After mastering the rules for the drafting of an indictment, the student may impress them on his memory by the following illustrations, taken from the Indictment Rules 1915-16. For a full form of indictment for Treason, see 12 Cr. App. R. 99.

(I) COMMENCEMENT.

The King *v.* A.B.

Durham County Assizes held at Durham
Presentment of the Grand Jury

A.B. is charged with the following offence [*or, offences*]

(II) COUNTS. The Commencement will be followed by one or more Counts¹; as in the following various examples.

A

STATEMENT OF OFFENCE.

Murder.

PARTICULARS OF OFFENCE.

A.B., on the day of in the county
of , murdered J.S.

B

STATEMENT OF OFFENCE.

Manslaughter.

PARTICULARS OF OFFENCE.

A.B., on the day of in the county
of , unlawfully killed J.S.

¹ All the counts ought to be tried together; 13 Cr. App. R. 173.

C**STATEMENT OF OFFENCE.****Accessory after the Fact to Murder.****PARTICULARS OF OFFENCE.**

A.B., well knowing that H.C. had murdered C.C., did on the day of and on other days thereafter, in the county of , receive, comfort, harbour, assist and maintain the said H.C.

D*First Count.***STATEMENT OF OFFENCE.**

Arson contrary to section 2 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , maliciously set fire to a dwelling-house, one F.G. being therein.

*Second Count.***STATEMENT OF OFFENCE.**

Arson contrary to section 3 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , maliciously set fire to a house with intent to injure or defraud.

E*First Count.***STATEMENT OF OFFENCE.****Larceny.**

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , stole a bag, the property of C.D.

Second Count.

STATEMENT OF OFFENCE.

Receiving stolen goods contrary to section 91 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A.B., on the day of , in the county of , did receive a bag, the property of C.D., knowing the same to have been stolen.

A.B. has been previously convicted of felony, to wit, burglary, on the day of at the Assizes held at Reading.

Contrast a form in use before the Act of 1915, for Larceny and Receiving:

Cambridgeshire, to wit.

The jurors for our Lord the King upon their oath present that John Doe, on the 1st day of January in the year of our Lord 1908, an umbrella and a gun, of the goods and chattels of Richard Doe, feloniously did steal take and carry away; against the peace of our Lord the King, his crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Doe afterwards, to wit, on the day and year aforesaid, the goods and chattels aforesaid, before then feloniously stolen taken and carried away, feloniously did receive and have, he the said John Doe (at the time when he so received the said goods and chattels as aforesaid) then well knowing the same to have been feloniously stolen taken and carried away; against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity.

Some points on the interpretation of indictments deserve to be noted though of lessened importance now that indictments are simplified.

The doctrine¹ (of uncertain authority but widely maintained) that penal Statutes should be construed "strictly"—*i.e.* in favour of the person accused—is not applied to indictments. An indictment, like any ordinary document, must be so construed *ut res magis valeat quam pereat*². Hence, if its words be capable of different meanings, it must be construed³ "in that sense in which the party framing the indictment must have used it if he intended his charge to be consistent with itself"; that is to say, in the sense most favourable to the prosecution⁴. Again, as in ordinary instruments, surplus words may be rejected; *utile per inutile non vitiatur*. Should two entire clauses be absolutely contradictory, so that one or the other must be rejected as surplusage, it is, as in deeds, the later one⁵ that must be so rejected (not, as in wills, the earlier).

An indictment was, we have seen, an utterance of the grand jury, not of a State official. Hence if, at the trial, the evidence varied, even in some triviality of a mere name, from the allegations in the indictment, the judge could not, at common law, alter the indictment to fit the evidence; for he had no right to tamper with that sworn utterance of other men. The miscarriages of justice thus caused were avoided by introducing a multiplicity of counts, so as to tell the same story in

¹ Broom's *Legal Maxims*, p. 550.

² Anson on Contracts, iv. ch. II. s. 1.

³ *Rex v. Stevens*, 5 East, at p. 257.

⁴ Yet in the old times of extremely severe punishments the judges often evaded that severity by an exaggerated strictness *against* the prosecution, in the construction of indictments. Cf. p. 474 n. *supra*. In Mr Cohen's interesting work on the Indictments Act (p. 4) we read of an accusation for murder being quashed in 1827, "because it stated that 'the jurors on their *oath* present,' instead of 'on their *oaths*.'" Similarly in 1829, under a statute which prohibited the stealing of "rams, ewes, or sheep," one Puddifoot was indicted for stealing a *sheep*. The evidence being that he stole an *ewe*, the conviction was held wrong (1 Moody, 247); a decision which recalls some of the subtleties of the Roman *legis actiones* which might fail if vines were described as "*vites*" instead of as "*arbores*"—the word used in the Twelve Tables. An equally striking instance is *Rex v. Woolcock*, 5 C. and P. 516. Abraham Lincoln remarked that "the old lawyers would have been willing to hang a man for merely blowing his nose. But they would have quashed the indictment if it did not say which hand he blew it with."

⁵ *Wyatt v. Aland*, Salk. 325. Cf. 2 Bl. Comm. 381.

a variety of ways and thus be ready for many possible variations in the evidence. A better remedy was provided by conferring on the court a statutory power—though only a very limited one—of amending indictments. But the Act of 1915 confers a comprehensive authority:

s. 5.—(1) Where, before trial, or at any stage¹ of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment² of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice; And may make such order as to the payment of any costs, incurred owing to the necessity for amendment, as the court thinks fit. (5 and 6 Geo. V. c. 90.)

¹ Even after an *indecisive* verdict; 13 Cr. App. R. 158.

² *E.g.* by adding “with intent to defraud”; 17 Cr. App. R. 182.

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